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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

Civil Action No. 508-69

SCANWELL LABORATORIES, INC.,
Plaintiff-Appellant,

-against-

DAVID D. THOMAS, Administrator (Acting)
of the Federal Aviation Administration,
UNITED STATES OF AMERICA

and

CUTLER-HAMMER, INC.,
AIRBORNE INSTRUMENT LABORATORY,
Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Scanwell Laboratories, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit centered in this case on October 23, 1975.

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 521 F. 2d 941, and is reproduced in its entirety at pages A1-A17 of the Appendix to this Petition.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on October 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Is the illegal award of a substantial government contract to an unqualified bidder, which is a violation of the Code of Federal Regulations, a tort as held by some courts, or breach of implied contract as held by other courts including the court below?

   (If the violation is a tort, the measure of damages may be very substantial actual loses suffered by the victimized bidder, whereas if the violation is a breach of implied contract, the courts have awarded as damages only the nominal cost of preparing the bid.)

2. Does the contracting officer have the discretion to disregard government regulations and violate the Code of Federal Regulations which prescribe the procedures for considering bids and awarding contracts?

STATUTES AND REGULATIONS INVOLVED

41 C.F.R. §1-2.301(a) (1969).

"To be considered for award, *a bid must comply in all respects with the invitation for bids* so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained." (emphasis added)

41 C.F.R. §1-2.404-2(a) (1969).

"*Any bid which fails to conform to the essential requirements of the invitation for bids,* such as specifications, delivery schedule or permissible alternates thereto, *shall be rejected as non-responsive.*" (emphasis added)

5 U.S.C. §702 (Supp.IV 1965-68); Section 10 of the Administrative Procedure Act.

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

28 U.S.C. §1346(b) (The Federal Tort Claims Act).

"Subject to the provisions of chapter 171 of this title, the district courts, *** shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. §2680(h)(1970) as amended by P.L. 93-253, §2. 88 Stat. 50 (1974) (exceptions to the Tort Claims Act)

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; ***."

STATEMENT

This case has been in the courts since 1969, and is the progenitor of the landmark decision *Scanwell Laboratories, Inc. v. David D. Thomas, Administrator (Acting) of The Federal Aviation Administration, et al.*, 424 F.2d 859 (D.C. Cir. 1970), reproduced at pages A18-A51 of the Appendix to this Petition. That decision gave rise to the doctrine, now popularly known as the "Scanwell Doctrine", to the effect that a disappointed bidder for a government contract "has standing to bring suit in the district court, that ..s suit is not barred by considerations of sovereign immunity, administrative discretion, or failure to exhaust administrative remedies, ***." (A51). That first *Scanwell* decision was from an appeal from an order dismissing Scanwell's complaint on the ground that Scanwell lacked standing to sue. In a most thorough, precedent-searching analysis, including a review of the leading authorities and the Congressional Record for an understanding of the legislative intent in amending the Public Contracts Act, the Court of Appeals, for the District of Columbia, for the first time opened the judicial door to unlawfully treated bidders for government contracts. The case was "remanded to the district court for a hearing on the merits of appellant's [Scanwell's] claim." (A51)

Petitioner, however, never obtained a hearing on the merits of its claim.

The Factual Basis of Petitioner's Claim Against Respondents

In early 1969, in response to a number of air disasters, the Federal Aviation Administration (FAA) issued an invitation for bids (IFB) for ten instrument landing systems. The IFB's were sent to petitioner-Scanwell, respondent-Airborne Instrument Laboratory (AIL), and others. The instrument landing systems were to be installed at airports to guide aircraft along a predetermined path to a landing approach. Such systems are designed to make the approach of aircraft to airports safer,

> "*** a result which the FAA sought to attain by carefully circumscribing the criteria for bids in such a way as to preclude bids from producers who did not already have operational systems installed and tested in at least one location." 424 F.2d at 860). The IFB provided:
>
> "*To be responsive* to this request, the contractor *shall* submit evidence that an identical equipment complement as that proposed for this procurement has previously been installed in at least one location and has achieved at least Category 1 performance as certified by an FAA flight check. . . . This *shall* be evidenced by the submission of a certification from the flight inspection source." (Emphasis added) (A20)

As stated by the Appellate Court in its first decision, at A20-21:

> "When the bids for the instrument landing systems were opened, it was discovered that appellant's [Scanwell's] was the second lowest bid. The lowest bid was entered by Airborne Instrument Laboratory, a division of Cutler-Hammer, Inc. Appellant alleged in the district court that appellee Cutler-Hammer's bid was non-responsive to the IFB in that Cutler-Hammer did not have a system installed in one location, nor did it have a certificate of performance based on an FAA flight check. Appellant therefore sought to have the action of the FAA in granting the contract to defendant Cutler-Hammer declared null and void as a violation of statutory provisions controlling government contracts and the regulations promulgated thereunder."

The Code of Federal Regulations provides:

> "To be considered for award, *a bid must comply in all material respects with the invitation for bids* so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained."

41 C.F.R. § 1-2.301(a) (1969) (emphasis added by the Court). The regulations go on to state that:

> "*Any bid which fails to conform to the essential requirements of the invention for bids,* such as specifications, delivery schedule or permissible alternates thereto, *shall be rejected as non-responsive.*" (A-21)

41 C.F.R. §1-2.404-2(a) (1969) (emphasis added by the Court).

AIL's bid, however, was non-responsive* to the IFB in that it did not have a system installed in one location, nor did it have a certificate of performance based on an FAA flight check. The bid, therefore, did not conform to either of the two essential requirements of the IFB.

Notwithstanding the manifest non-responsiveness of the AIL bid, the FAA contracting officer awarded the contract to AIL. Scanwell protested the award which was denied by the FAA, and this action ensued.

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*These allegations of the complaint were, of course, deemed to be true in the courts below.

The Original and Present Claims Against Respondents

Initially, Scanwell requested the District Court to declare the award to AIL illegal, have it set aside, and to enjoin AIL from working on the contract.

Although Scanwell moved for immediate review of the District Court's dismissal of its claim, its motion was denied and petitioner's standing to sue was not established until one year later. By that time the request for injunctive relief was rendered moot as AIL had substantially completed performance of the contract.

Scanwell thereupon amended its complaint and alleged that the contracting officer had acted tortiously, or alternatively had breached an implied contract, by improperly awarding the contract to AIL, and that AIL had received the contract through unfair competition and in violation of the Sherman Act, and asked damages against both the Government and AIL.

The District Court transferred the contract claim against the federal respondent to the Court of Claims, and Scanwell dismissed the antitrust count against AIL. The District Court also dismissed the tort claim against the Government and AIL for failure to state a claim on which relief can be granted. It is only the dismissal of the tort claim, affirmed by the Appellate Court, for which review is sought. The question of whether an illegal award of government contract is a tort (as held by some courts) which is in direct conflict with the Court of Claims and the second Scanwell decision* which hold that the illegal award is a breach of implied contract.

*The panels sitting on the two Scanwell decisions were different. The second panel included Judge Oscar Davis, of the Court of Claims, who sat by designation and authored the opinion The Court of Claims had previously ruled that an unlawful award of contract by the contracting officer was in the nature of a breach of implied contract and not a tort. Scanwell, in its appeal to the Circuit Court, was seeking review by a court which had not previously committed itself to a position on this issue. It is submitted that Judge Davis having previously committed himself to the Court of Claims position should have disqualified himself from sitting on this appeal (A-11, f.n. 6). The panel, therefore, which included Judge Davis sitting was not truly an impartial panel.

REASONS FOR GRANTING THE WRIT

Whether the claim sounds in tort or contract is a question of major importance as a matter of law and policy. In those jurisdictions which treat the wrongdoing as a tort, the damages capable of being awarded are realistically related to the wrong suffered by the complainant, which may be substantial lost profits. In jurisdictions which treat the wrongdoing as a breach of implied contract, the courts have awarded only nominal damages commensurate with the cost of preparing the bid. The dichotomy is obviously grossly unfair to the complainant who is jurisdictionally bound to the "contract" court, and provides a great inducement to forum shop and to file suit in a "tort" jurisdiction. As indicated in the following discussion, the courts themselves have proclaimed their need for guidance in this area of uncertainty.

The federal government today is the principal buyer of goods and services, and as last reported exceeds 60 billion dollars annually. The public interest in this field is probably greater than in any other financial area of government operation, and the sanctity of the competitive bidding process is the cornerstone of public protection.

The only assurance for equal footing in the competitive bid process is steadfast compliance with the regulations. Any deviation from literal responsiveness to the requirements for bid gives an advantage to one bidder over another, and deviation under the guise of discretion can be used to cover-up corruption, favoritism or other mal-practice.

The Code of Federal Regulations (CFR) Section 1-2.404-2(a), dictates that a non-responsive bid *shall* be rejected. The Regulations have the force of law; *Paul v. U.S.*, 371 U.S. 245,

255 (1963), and government officers have a duty to follow them.

The Government agency here, the FAA, has no discretion under 5 U.S.C. §701 to accept a non-responsive bid any more than it has discretion to violate any other law. The fact that the bid was non-responsive cannot be disputed which renders this case particularly well suited for review by this Court, as the question is purely one of law.

Prior to the first *Scanwell* decision, the Court of Appeals spoke on the importance of literal responsiveness to the bidding requirements in *Superior Oil v. Udall**, 409 F.2d 1115, 1120 (D.C. Cir. 1969):

> "The requirement of *steadfast compliance* with competitive bidding procedure comports best with the need to promote the integrity of the bidding process. Although such a stance may entail some limitation on the Secretary's discretion, it seems clear that this is an *indispensable ingredient* to the maintenance of competitive bidding processes which will engender public confidence and that of persons dealing with the government." (emphasis added).

In the *Superior Oil* case, the request for bids required that the bid for the sale of certain oil leases be signed by an authorized officer of the bidding company, and be accompanied by a check for one-fifth of the bid price. Union Oil Company submitted the highest bid with the requisite check, but the bid was not signed by an authorized officer. Superior's bid was the second highest. The Secretary decided that the bid made by Union was valid; the award, however, was set aside by the District Court and the injunction was affirmed by the Appellate Court. Pragmatically, it is difficult to imagine a less significant deviation from *strict compliance with* the bid requirements. Nevertheless, the Courts below held that signing the bid was a material requirement, and

*The panel consisted of Judges Burger, Tamm and Robinson. Judge Tamm was also the author of the first Scanwell decision, but he was not on the second panel.

that the Secretary of the Interior did not have the discretion to accept a non-responsive bid.

The first *Scanwell* case followed the *Superior Oil* case, and quoted the Comptroller General, at A37:

> ". . . when a bid is nonresponsive in a material respect, it cannot be corrected even though the nonresponsiveness may be due to mistake or oversight." (emphasis in original quote).

The Second Scanwell Decision Is in Direct Conflict with the First Scanwell Decision and All Cases Which Followed Scanwell

The second *Scanwell* decision, per Judge Davis, essentially states that the acceptance by the government contracting officer of a non-responsive bid is discretionary, and a discretionary act is an exception to the Tort Claims Act (28 U.S.C. §2680(a)). Specifically, the Court below said, at A13-A14:

> "It cannot be gainsaid that the FAA had to make some relatively high-level choices. It had to decide whether the waived requirements in AIL's bid were, on the one hand, minor irregularities or mere differences in responsibility of the bidders, or, on the other, were essential requirements of responsiveness of the bid. It had to decide, in addition, whether to set aside all bids and readvertise."

The statement contains serious erroneous premises. The first is the statement that the FAA "had to decide whether the waived requirements in AIL's bid———." There were *no* waived requirements! AIL simply submitted a bid which was deficient in its compliance, and therefore two consequences were necessarily (not discretionarily) mandated: first, it was non-responsive; and second, "it cannot be corrected," and should have been rejected as a matter of law.

The second erroneous premise is the statement that the FAA, "had to decide, in addition, whether to set aside all bids and

readvertise." In the *Superior Oil* case where the deficiency in the bid omission was far less significant, there was no suggestion of setting aside all bids and readvertising. Indeed, such an exigent measure is permitted only under extreme circumstances* which do not remotely exist here. Moreover, in the first *Scanwell* decision, the Court, per Judge Tamm, said,

> "While he may very well have the power to reject all bids if he deems such action to be in the public interest, he may not award a contract illegally under the guise of discretionary action." (A48)

In an attempt to reconcile the two conflicting *Scanwell* opinions on this point of "discretion" Judge Davis said, at A14,

> "When this court said in the earlier appeal (424 F.2d at 873) (A45) that on the merits the trial court could possibly find that 'there is no discretion to ignore the regulations regarding responsiveness of bids' it meant it could well be an abuse of discretion to ignore the regulations regarding responsiveness of bids. The court was speaking in terms of the Administrative Procedure Act, 5 U.S.C. §701(a)(2), not the Tort Claims Act."

In essence, the court is saying: an abuse of discretion opens the front door to the District Court under the APA, 5 U.S.C. §701(a)(2), but leads the complainant directly out the back door under the "discretionary exception" of 28 U.S.C. §2680(a). Surely, the doctrine pronounced in the first Scanwell decision is

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*The power to set aside all bids is used sparingly and only under the following special circumstances;

(32 C.F.R. §2.404-(b)95), (6) (8) (Jan. 1, 1967);

"all otherwise acceptable bids received are at unreasonable prices;"

"bids received indicate that the needs of the Government can be satisfied by a less expensive article differing from that on which the bids were invited;"

"for other reasons, cancellation is clearly in the best interest of the Government."

more meaningful than that. If not, a gigantic hoax has been played on many Courts* and litigants.

A Brief Comment on the Deficiency of AIL's Bid

It is recalled the IFB specified two requirements of the bidder: first, "the contractor shall submit evidence that an identical equipment complement as that proposed for this procurement has previously been installed in at least one location;" and second, that such equipment "has achieved at least Category 1** performance as certified by a FAA flight check. . . . This shall be evidence by the submission of a certification from the flight inspection source."

As incredulous as it may appear, AIL submitted a bid which did not comply with either of the two basic requirements, and yet received the contract. AIL did not have an operating system at any one location, and obviously, therefore, could not furnish certification of performance.

In spite of the *total* non-compliance, Scanwell (II) without any record whatever speaks of "minor irregularities or mere indifferences in responsibilities of the bidders." (A14) In fact at A8, the Court states that "AIL offered evidence that it received certification of all parts of the system, but at two different locations." There is utterly no basis in the record for the statement. In fact, the contrast in the record makes the award even more suspect.

During the pendency of Scanwell (I) the FAA, in an attempt to justify its action in making the award, filed an affidavit by the contracting officer. The affidavit refers to flight reports submitted by AIL (not certifications as stated by the Court), and an

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*Scanwell (I) has been followed in hundreds of cases as listed in Shepard's citations.

**Category I performance means the system is capable of guiding an aircraft to an altitude of 200 feet of the runway.

examination of the flight report attached to Cutler-Hammer's bid reveals that at one of the two partial installations *half of the equipment inspected did not even operate!**

The Scope of the Scanwell Doctrine is Now Uncertain

Whether the first Scanwell decision (Scanwell I) grants full jurisdiction or limited jurisdiction to a district court is uncertain at this time.

In *Merriam v. Kunzig*, 476 F.2d 1233 (3 Cir. 1973), the court reversed the lower court and followed Scanwell I. In a dissenting opinion by Judge Adams on the petition for rehearing *en banc*, he referred to the uncertainty in the law, at 476 F.2d at 1245:

> "At the same time, a careful review of the relevant case law has persuaded me that the panel's analysis of the important issues presented in this appeal may lead to uncertainty in an area of the law already too well known for its lack of guidance."**

In *Hayes International Corporation v. McLucas*, 509 F.2d 247 (5 Cir. 1975), the Court cited Scanwell I for the proposition that the Administrative Procedure Act granted standing and overruled *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940).

Yet other courts have indicated the issue is open. In *National Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1974), the Court noted the conflict in the circuit court opinions. See 510 F.2d at 702, fn 52, citing *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1109 fn 4 (D.C. Cir. 1974). Both cases recognized that the question as to whether

*Exh. B. to Complaint, see A52-56. The flight report is annexed as A57-61.

** *Merriam* is considered further in the annotation "Standing of Unsuccessful Bidder for Federal Procurement Contract to Seek Judicial Review of Award", 23 ALR Fed. 301.

Section 10 of the Administrative Procedure Act, 5 U.S.C. §701-706, is an independent source of jurisdiction has not been determined by the Supreme Court.

In *Cincinnati Electronics Corporation v. Kleppe*, 509 F. 2d 1080, 1085 (6 Cir. 1975), the Court "noted the present uncertainty of the issue of standing by an unsuccessful bidder for a government."

And in *Schlafly v. Volpe*, 495 F.2d 273, 281 (7 Cir. 1974), the Court noted the absence of guidance.

> "One question regarding which there exists a clear conflict among the Circuits is whether the APA constitutes a waiver of sovereign immunity. The Second Circuit has so held in Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969), as has the Court of Appeals for the District of Columbia in Scanwell Laboratories v. Shaffer, 137 U.S. App. D.C. 371, 424 F.2d 859 (1970). Estrada v. Ahrens, 296 F.2d 690 (5 Cir. 1961), held that the APA 'makes a clear waiver of sovereign immunity in actions to which it applies," 296 F.2d at 698, but the Fifth Circuit apparently abandoned this position in Colson v. Hickel, 428 F.2d 1046 (5th Cir. 1970), without expressly overruling Estrada. The First, Fourth, Eighth, Ninth and Tenth Circuits have held that the APA does not constitute a waiver of sovereign immunity."
>
> *"To the extent that the Supreme Court has thus far considered the impact of the APA upon the jurisdiction of federal courts to review agency decisions, little guidance has been given."* (Emphasis added)

The nature of the tort remains uncertain also. The Court below said in this case at A11:

> "It is apparent that this case lies in that region of uncertainty between contract and tort which under the old common law forms of action would have allowed (in-

deed, forced) the plaintiff to choose the theory of his action."

These uncertainties have further led to additional inconsistencies as we shall now discuss.

There is Conflict Between the Courts As to Whether an Illegal Award of Contract is a Tort or Breach of Implied Contract

In the decision of Scanwell (II) the Court acknowledged the conflict among certain courts, and the admitted uncertainty of the Court's conclusion. The Court indicated that the Court of Claims has decided that suits by disappointed bidders are founded in an implied contract "between the Government and its bidders under which the Government agrees to consider each bid fairly and honestly in return for the bidder's submission of an eligible bid." (A10)

The Ninth Circuit has recently followed the decisions of the Court of Claims in *Armstrong & Armstrong, Inc. v. United States*, 514 F.2d 402, 403 (9 Cir. 1975).

The significance in treating the claim as one sounding in contract is that the Court of Claims awards damages for the cost of preparing the bid; a "slap-on-the-wrist" type penalty.

The Court of Claims retains jurisdiction by fictionalizing an implied contract. The bid, says the Court, is in the nature of an offer which should have been lawfully accepted (thus, the implied contract), but because of the malfeasance of the contracting officer, the contract was awarded to another. The Court, however, has refused to consider lost profits as damages because, says the Court, the contract never came into being.

The tort theory of damages, however, admits of practical relief, and other courts have found that the illegal award of contract is, indeed, a tort. As pointed out by the Court below,

"On the other hand, one district court which con-

sidered the issue, as well as the Utah Supreme Court in a parallel case, have found that a claim such as this sounds in tort. [citing cases].

"* * * It is apparent that this case lies in that region of uncertainty between contract and tort * * *." (A11)

Further, there is a sharp inconsistency between the two Scanwell decisions. The Court in Scanwell (I) indicated that a challenge to the legality of agency action in awarding a contract was *not* a claim arising out of contract, and that it would "require distorted statutory interpretation" to hold otherwise (A49). Indeed, the Court in Scanwell (I) held it was not necessary for Scanwell first to exhaust its administrative remedies before seeking judicial relief precisely because the claim did not sound in contract. The Court said,

"* * *. 4 C.F.R. §31.1-31.8 (1969), are designed to provide procedures through which claims on behalf or against the government are to be settled [i.e., through administrative remedies]. While *claims arising out of contracts with the government are clearly covered,* it would require distorted statutory interpretation for us to hold that a bidder who challenges the legality of agency action in awarding a contract is *required* to file a claim with the General Accounting Office before proceeding with action to secure judicial review of the transaction." (A49)

Thus, the Court of Claims holds that the challenge to the legality of agency action sounds in contract (albeit implied), whereas Scanwell (I) holds that such would require a "distorted statutory interpretation."

The conflict among the courts has major implications. If recovery is under the tort theory, petitioner may claim his proven losses and/or AIL's ill-gotten gains if favoritism or other form of collusion is proven. Manifestly, future litigants will avoid the Court of Claims and those Circuits which treat the wrongdoing as a contract action and award only bid preparation costs; and,

instead, seek jurisdictions which treat the wrongdoing as a tort. This case provides the Court with an opportunity to resolve this conflict with a record which is free of factual dispute. Indeed, petitioner still has not had a hearing on the merits so that the legal question presented in the context of the record is uncluttered and can be treated in the abstract.

The Illegal Award of Contract is a Tort

The Court in Scanwell (I) recognized the existence of tortious conduct which clearly distinguishes this case from any other precedent. The duty and obligation of the Government to comply with the law of the procurement process is not discretionary, but is "an indispensable ingredient to the maintenance of competitive bidding processes which will engender public confidence * * *." *Superior Oil v. Udall,* 409 F.2d 1115, 1120 (D.C. Cir. 1969), 133 U.S. App. D.C. 198; *United States v. Purcell Envelope Co.,* 249 U.S. 313, 318 (1919). The violation of the duty to perform is the tort for which petitioner seeks relief, and not misrepresentation of any kind; *Hungerford v. United States,* 307 F.2d 99, 103 (9 Cir. 1962). The duty and obligations owed to Scanwell are based on the laws of the procurement process. The violations of such duties are not minor torts, but have substantial implications and can affect the welfare, indeed existence of small business. A large number of situations have come to light since Scanwell, wherein the federal judiciary have criticized arbitrary and capricious executive action, (discussed infra, pp. 18-19).

These situations reflect only the tip of the iceberg. The complete iceberg is discussed by Former Secretary Packard.*

"I visited one plant last year that was running a year behind its project schedule. After a couple of hours it was apparent the company knew it would be at least a year off schedule on the day the contract was signed. I asked the manager why he offered to do the job in one year less than was possible. The essence of his reply was—yes, we knew we could not meet the terms of the contract, but there was no way to get the contract if we told the truth.

One serious impediment to good defense management is that defense contractors can appeal directly to the Congress. On one occasion, about two years ago, a company tried to reverse a decision I had made by appealing to one of our congressional committees. The company's recommendation was purely one of self-interest and it was wrong. The company knew it, and I knew it, and so I called the management of the company and told them so.

What is the solution? We are going to have to stop this problem of people playing games with each other. Games that will destroy us, if we do not bring them to a halt."

This article was before the courts below, Wall Street Journal, June 6, 1972, page 8 (A62).

Our complaint against the Government is uniquely limited to misconduct on the part of the Government officials. They should not be permitted such behavior under the cloak of executive action or discretion in the biggest business in the United States. The misconduct has caused petitioner substantial damage for which petitioner seeks compensation.

The Court's Explanation of Scanwell's Claim is Erroneous

The Court (Scanwell II) purports to explain the rationale of petitioner-Scanwell's claim which explanation is completely in error (A12). Judge Davis phrased Scanwell's claim as breach of implied contract which is the very antithesis of our contention. The Court said:

> "In traditional torts terminology Scanwell's claim is that (1) the Government, by the IFB and the regulations incorporated therein by implication [citing case], induced plaintiff to prepare a bid in reliance that the bid would be considered as set out in the IFB and regulations, and (2) that, plaintiff had spent a considerable sum in preparing the bid, the Government refused to act in the manner in which it had represented it would act, causing Scanwell to lose both the money

spent in preparation of its bid and prospective contract profits. To the extent that this states a tort at all, it appears to be a claim for negligent misrepresentation of defendant's intentions."

This purported statement of petitioner's contention could not be more wrong, and it distorted petitioner's claim into a theory which permitted the Court below to pigeon-hole it into a Tort Claims Act exception.

As explained above, petitioner's contention is simply that the Government agent owed Scanwell and other the duty not to act arbitrarily and capriciously by illegally awarding the contract to a non-responsive and unqualified bidder. The government agent was not free to disregard agency procurement regulations. That is the sum-total of petitioner's claim which sounds in tort.

No one suggested a defense of negligent misrepresentation not either of the respondents below. They did suggest the defense that the Government's illegal award constituted "interference with contract rights" which would be an exception under 28 U.S.C. §2680(h). The Court apparently recognized that such defense was untenable and in its decision came up with the previously unheard of defense of "negligent misrepresentation." If the arbitrary and capricious act of an agent in illegally awarding a contract constitutes "negligent misrepresentation" then the entire code governing federal procurements is a facade without substance.

THE PUBLIC POLICY PURPOSE OF SCANWELL (I) HAS BEEN FOLLOWED IN SUBSEQUENT DECISIONS BY MANY COURTS; TORT DAMAGES ARE CONSISTENT WITH SUCH PURPOSE

Scanwell (I)'s impact on the procurement process has been salutary in encouraging victimized bidders to challenge and uncover many instances of unbridled and unlawful executive action in the procurement filed. The basic holding of Scanwell

(I) should not be debilitated by either a "distorted interpretation" of the regulations or by a broad and non-literal construction of the technical defense §2680(h).

A brief review of the public policy effect achieved by Scanwell (I) demonstrates the desirable consequences of Scanwell (I) in the procurement process, and supports petitioner's assertion that the Government on occasion has successfully, and cavalierly disregarded the law.

In *Creque v. Government of the Virgin Islands*, 354 F.Supp. 849, 853 (D.C. Virgin Islands 1973), the court held that the disappointed bidder had sufficient standing to challenge the "frequent" and "cavalier" action of the Government, and that the Government "may not contract illegally and then attempt to shield its errors under the guise of discretionary action."

In *Black Hotel Company v. Froehlke*, 351 F.Supp. 956 (W.D. Okla. 1972), the allegations of substantial and wrongful procedures in the bidding process were made. The Court found the government 1) owed a specific duty to the bidder as a bidder and not merely as a private attorney general; 2) that the bidder was entitled to damages; 3) that plaintiff had standing to sue; and, 4) that there was a *duty* to award the contract to the lowest bidder.

Ainslic Corporation v. Middendorf, 381 F.Supp. 305, 307 (D.Mass. 1974) followed Scanwell I and also recognized that the remedy for bid costs was illusory. The Court noted the importance of the word "shall" in the procurement regulations. This interpretation as to the non-discretionary force of procurement regulations is directly at odds with Scanwell II's view that the agency has discretion to ignore the regulations.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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1975 DECISION (521 F.2d 941)

SCANWELL LABORATORIES, INC.,
Appellant,

v.

DAVID D. THOMAS, Acting Administrator
of the Federal Aviation Administration, et al.

No. 73-1796.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 6, 1975

Decided Oct. 23, 1975.

A disappointed bidder sought to allege tort claims against both the government and the successful bidder. The claims were dismissed by the United States District Court for the District of Columbia, William B. Bryant, J., for failure to state a claim on which relief could be granted. The disappointed bidder appealed. The Court of Appeals, Davis, Judge, Court of Claims held that a complaint that the government in good faith but incorrectly caused the bidder to act in reliance on a promise of Federal Aviation Administration that it would abide by terms of an invitation for bids and of regulations was, in effect, a claim for negligent misrepresentation, and fell within exceptions to government liability under the Federal Tort Claims Act. The claim that the contract had been awarded to another as a result of the FAA's acceptance of a nonresponsive bid rested at most upon an abuse of discretion in the contracting officer's discharge of an obligation which was not purely ministerial, and fell within the "discretionary exception" to liability of the United States

under the Federal Tort Claims Act. No action for unfair competition or unjust enrichment was stated.

Affirmed.

1. United States — 111(10)

Where claim against United States, which bankrupt claimant had assigned to counsel, was transferred, with consent of bankruptcy court, back to real party in interest, requirement that real party in interest be identified was satisfied, as well as rule of Assignment of Claims Act. 31 U.S.C.A. §203; Fed.Rules Civ. Proc. rule 17(a), 28 U.S.C.A.

2. United States — 111(2)

Purposes of Assignment of Claims Act are that United States be able to deal with one claimant only, and that there be no trafficking in claims against the government. 31 U.S.C.A. §203.

3. United States — 64

General accounting office procedure for reviewing contract awards, through bid protest procedures, is informal and is not required as prerequisite to judicial review.

4. United States — 64

Regulations concerning contract awards create duty on part of government procurement officials running to bidders as well as to public.

5. United States — 64

Monetary recovery against United States is not automatic consequence of any abuse of discretion in award contracts.

6. Action — 17; United States — 64

Where action of Federal Aviation Administration upon bids submitted to it took place in offices of the Administration in

Washington, D.C., it was District of Columbia law which controlled substantively in action by disappointed bidder.

7. United States — 78(2)

Tort Claims Act is abrogation of sovereign immunity to be liberally read when applicable, but retention of immunity in exceptions of the Act must also be respected. 28 U.S.C.A. §§1346(b), 2680(a, h).

8. United States — 78(5)

Disappointed bidder's complaint that government in good faith but incorrectly caused bidder to act in reliance on promise of Federal Aviation Administration that it would abide by terms of invitation for bids and regulations was, in effect, a claim for negligent misrepresentation, and fell within exceptions to government liability under Federal Tort Claims Act. 28 U.S.C.A. §§1346(b), 2680(a, h).

9. United States — 78(12)

Claim of disappointed bidder that contract had been awarded to another as result of federal Aviation Administration's acceptance of nonresponsive bid rested at most upon abuse of discretion in contracting officer's discharge of obligation which was not purely ministerial, and fell within the "discretionary exception" liability of United States under Federal Tort Claims Act. 28 U.S.C.A. §2680(a).

10. United States — 78(12)

Under Federal Tort Claims Act, even gross abuse of discretion will not predicate award of tort damages. 28 U.S.C.A. §2680(a).

11. United States — 125(5)

Administrative Procedure Act is not alone a waiver of sovereign immunity in suits seeking money damages against United States. 5 U.S.C.A. §§701(a)(2), 706(2)(A).

12. Federal Civil Procedure — 2533

Concurrent filing of sworn-to answers to interrogatories with motion to dismiss had effect, under rule, of turning motion to dismiss into motion for summary judgment. Fed.Rules Civ.Proc. rules 12(b), 56, 28 U.S.C.A.

13. Federal Civil Procedure — 2536

Where concurrent filing of sworn-to answers to interrogatories with motion to dismiss had effect under rule of turning motion to dismiss into motion for summary judgment, and plaintiff did not respond by counteraffidavit or seriously attempt to convince court that response was legally insufficient to answer claim, factual predicate of plaintiffs' cause of action ceased to have any legal effect. Fed.Rules Civ.Proc. rules 12(b), 56, 28 U.S.C.A.

14. Trade Regulation — 425

Though certain acts, such as disparagement of a competitor's product, may be tortious when undertaken solely for purpose of destroying rival, they lose their tainted status when undertaken for the legitimate purpose of reasonably forwarding personal interest and developing trade.

15. Trade Regulation — 564

Where plaintiff alleged that defendant's actions had been taken to enhance defendant's own competitive position and where methods allegedly used were not by themselves illegal, there was no actionable unfair competition.

16. United States — 64

Allegations that bidder for government contract priced below the cost of others amounted only to claim that bidder was low bidder, which was clearly legitimate act by competitor.

17. Money Received — 1

Unjust enrichment is basically equitable remedy in which plaintiff is required to show not only that defendant has received an advantage but also that it would be unfair for him to retain that advantage as against plaintiff.

18. Money Received — 9

Remedy of unjust enrichment is sometimes applied when plaintiff is not person conferring benefit on defendant, as where stranger augments defendant's goods with those of plaintiff, but it is usually necessary, for remedy to apply, for plaintiff to show that he conferred benefit.

19. United States — 64

Where United States retained right to reject all bids, disappointed bidder was improper party to ask for restitution, and where, even if there was abuse of discretion in awarding contract to defendant, it would not be unfair to allow defendant to retain fruits of contract as against plaintiff, there was no cause of action for unjust enrichment.

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action 508-69).

John M. Calimafde, New York City, with whom Paul H. Blaustein, Washington, D.C., was on the brief for appellant.

Barbara L. Herwig, Atty., Dept. of Justice, with whom Carla A. Hills, Asst. Atty. Gen., Earl J. Silbert, U.S. Atty., and Stephen F. Eilperin, Atty., Dept. of Justice, were on the brief for appellee Administrator of the Federal Aviation Administration.

David V. Anthony, Washington, D.C., for appellee, Cutler-Hammer, Inc.

Before LEVENTHAL and ROBINSON, Circuit Judges, and DAVIS,* Judge, United States Court of Claims.

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*Sitting by designation pursuant to 28 U.S.C §293(a).

Opinion for the Court filed by Judge DAVIS.

DAVIS, Judge:

[1,2] This is the latest round in a government bid protest which has been in the courts since 1969 when the Federal Aviation Administration awarded, over the objection of plaintiff-appellant Scanwell Laboratories, Inc. (Scanwell), a contract to the Airborne Instrument Laboratory (AIL), a division of defendant Cutler-Hammer, Inc., to construct and install ten Instrument Landing Systems (ILS). Plaintiff's original complaint asked that the court declare the award to AIL illegal, set it aside, and enjoin AIL from working on the contract. The District Court dismissed the suit on the ground that a disappointed bidder lacked standing to protest in court the award of the contract to another. This court reversed, finding that Scanwell had standing to bring the suit. *Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970). However, no injunction was issued by the District Court on remand, and AIL proceeded to complete work on the contract. The defendants (the Government and Cutler-Hammer) then moved to dismiss the complaint as moot (on the ground that by then the contract had been performed). This was denied by the District Court but Scanwell was granted permission to file an amended complaint. The new complaint alleged that the federal defendants had acted tortiously and in violation of an implied contract in improperly awarding the contract to AIL and that Cutler-Hammer had received the contract through unfair competition and in violation of the Sherman Act, and asked for damages against both defendants. The District Court has transferred the contract claim against the federal defendants to the Court of Claims, 28 U.S.C. §1406(c), and on plaintiff's own motion has dismissed the anti-trust count against Cutler Hammer.[1] Neither of these actions has been appealed. Instead,

1. At first the District Court left count 4, the anti-trust action against Cutler-Hammer, outstanding even though it transferred or dismissed the other counts. In their brief the federal appellees raised the point that this court lacks jurisdiction over the appeal of the dismissed counts because the orders appealed from an not final orders (retaining count 4 in the district court) and the lower court made no express determination under F.R.C.P. Rule 54(b) that there is no just reason for delay and likewise made no express direction for the entry of judgment. Nor did the district court certify the dismissed counts for interlocutory appeal under 28 U.S.C. §1292(b). After the Government had presented this issue of appealability, plaintiff-appellant voluntarily dismissed the anti-trust count (count 4). As of the present, therefore, all of the claims in the amended complaint have been disposed of by or in the district court, and there is no question that the appeal is properly here.

the case is before us again on review of the lower court's dismissal of the tort claims against both the Government[2] and Cutler-Hammer for failure to state a claim on which relief can be granted.[3]

I.

Only a brief recapitulation of the facts is needed. In early 1969, in response to a number of air disasters, the Federal

2. While David D. Thomas, the Acting Administrator of the Federal Aviation Administration, remains a named defendant, Scanwell does not request damages personally against him. As the court below noted at an earlier stage in the case, "[r]egardless of how the caption in this case reads, the Government has always been and is now the real defendant." Memorandum at 3, C.A. No. 508-69, filed April 21, 1972.

3. Just prior to oral argument, both defendants filed motions to require the plaintiff to identify the real party in interest under F.R.C.P. Rule 17(a), contending that Scanwell, which is in bankruptcy, had assigned its claim to its counsel. In addition, the federal defendants filed a motion to dismiss the appeal on the basis that the assignment was made without the consent of the United States, that it was invalid under the Assignment of Claims Act, 31 U.S.C. §203 (1970), and that therefore there was no real party in interest eligible to pursue the claim. Scanwell's counsel, by affidavit, has informed us that the claim, with the approval of the bankruptcy court, has been transferred back to Scanwell, which is the real party in interest. This satisfied the requirement that the real party in interest be identified as well as the rule of the Assignment of Claims Act, since the purposes of that statute—that the United States be able to deal with one claimant only, and that there be no trafficking in claims against the Government, *see Patterson v. United States*, 354 F.2d 327, 329, 173 Ct. Cl. 819, 822-23 (1965)—have been served by the re-transfer to the original claimant. In these circumstances, the defendants' motions are granted and are deemed to have been complied with by appellant.

Aviation Administration (FAA) sought quickly to equip ten small airports with systems to automatically guide a plane from 200 feet away along a predetermined path to a landing strip. Each system consisted of 4 separate and distinct parts—the glide slope, the localizer and two markers. The invitation for bids (IFB) stated that time was of the essence, that bids were to be opened fifteen days after the IFB was issued, and the systems were to be delivered starting 210 days after the execution of the contract. In order to assure that working systems would be delivered on time, the IFB stated:

> To be responsive to this request, the contractor shall submit evidence that an identical equipment complement as that proposed for this procurement has previously been installed in at least one location and has achieved at least Category I performance as certified by an FAA Flight Check (or another ICAO country's flight inspection).

IFB's were sent to both Scanwell and AIL (as well as others), and both bid on the contract.

There were four bidders: one failed to include a flight check at all and the bid was determined to be unresponsive; two—Scanwell and IT&T—submitted flight checks literally within the terms of the IFB; and AIL offered evidence that it had received certification of all parts of the system, but at two different locations. AIL was the low bidder at $65,720 per system, with Scanwell second at $92,497 (per system).

When the FAA announced that it would consider AIL's bid and award the contract to that company, Scanwell filed protests with both the FAA and the General Accounting Office, stating that the IFB clearly required certification of the entire system at one location and that procurement regulations forbade waiver of that requirement. Upon denial of the protest to the FAA, Scanwell filed its original complaint in the district court. While the appeal of the dismissal of the original action was pending, and after the contract had been awarded, GAO also denied the

protest, holding that it was unclear whether the IFB certification requirements were really directed to responsiveness of the bid, rather than responsibility of the bidder (as to which FAA discretion was more substantial),[4] that no bidder had been prejudiced by the vagueness, and the award to AIL could stand.

[3] Plaintiff's claim against the Government is based on the theory that the AIL bid, with its dual location certification, was not responsive to the IFB, and therefore that the FAA violated its procurement regulations in awarding the contract to AIL. The relevant regulation states: "To be considered for award, a bid must comply in all material respects with the invitation for bids so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained." 41 C.F.R. §1-2.301(a) (1974). The Government, on the other hand, justified its conduct on the basis of another regulation stating that minor informalities or irregularities may be ignored. 41 C.F.R. §1-2.405 (1974). In addition, the GAO ruling supporting the award suggests that the IFB certification demands may in fact have been merely experience requirements, which measure responsibility of the bidder not responsiveness of the bid, and that therefore AIL's failure to meet the letter of the IFB does not disqualify it under the regulation cited by Scanwell.[5]

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4. The "well-established distinction between the responsibility of the bidder and the responsiveness of the bid" is fully discussed in *Northeast Construction Co. v. Romney*, 157 U.S. App. D.C. 381, 485 F.2d 752, 759-60 (1973).

5. The General Accounting Office, a branch of the Congress rather than the executive, provides a non-judicial forum for review of contract awards through its Bid Protest Procedures, 4 C.F.R. Part 20 (1975). The procedure is informal and not required as a prerequisite to judicial review. *Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S.App.D.C. 371, 424 F.2d 859, 875-76 (1970). However, the agency does consider almost 1000 bid protests a year, and has developed an expertise in the area. *See Wheelabrator Corp. v. Chafee*, 147 U.S.App.D.C. 238, 455 F.2d 1306, 1313-17 (1971).

II.

[4, 5] The purpose and interaction of these regulations and theories have been discussed fully in our prior opinion, and we do not depart at all from our decision, stated there, that they create a duty on the part of government procurement officials which runs to bidders as well as to the public. 424 F.2d at 864-65. It is quite possible that Scanwell's interpretation of the IFB and the regulations is correct, and that the FAA abused its discretion in interpreting them improperly. However, *monetary* recovery against the Government is not, as plaintiff suggests, an automatic consequence of the existence of these factors.

Scanwell alleges that "The action of FAA in waiving the explicit requirements of the bid and in accepting the AIL bid and awarding said illegal contract to AIL constituted wrongful arbitrary and capricious misconduct, and not in accordance with law." Later documents, coupled with a jurisdictional allegation that the action comes within 28 U.S.C. §1346(b) (the Federal Tort Claims Act), inform us that the pleadings now before us are meant to state a tort. But the problem is whether this part of the complaint has set forth a claim as to which the United States has consented to be sued under the Tort Claims Act. If the claim falls outside the Act completely or within one of the exceptions-to-liability embodied in the statute, the District Court was of course entirely correct in dismissing the action.

It is therefore initially appropriate to touch upon the question whether Scanwell's complaint can properly sound in tort at all. The Court of Claims, in considering actions by disappointed bidders for bid preparation costs, has decided that such suits are founded in an implied contract between the Government and its bidders under which the Government agrees to consider each bid fairly and honestly in return for the bidder's submission of an eligible bid. *See Heyer Products Co. v. United States,* 140 F.Supp. 409, 412-13, 135 Ct.Cl. 63, 69 (1956); *Keco Industries, Inc. v. United States,* 428 F.2d 1233, 1237, 192 Ct.Cl. 773, 780 (1970); *McCarty Corp. v. United States,* 499 F.2d 633, 637, 204

Ct.Cl. 768, 775 (1974).[6] This conclusion has also been reached by the Ninth Circuit in the recent case of *Armstrong & Armstrong, Inc. v. United States,* 514 F.2d 402, 403 (9th Cir. 1975), where the court awarded bid preparation damages of $9,414 under the court's Tucker Act jurisdiction, and denied recovery under the Tort Claims Act. On the other hand, one district court which considered the issue, as well as the Utah Supreme Court in a parallel case, have found that a claim such as this sounds in tort. *Edelman v. Federal Housing Administration,* 251 F.Supp. 715, 719 & n.7 (E.D.N.Y. 1966), *aff'd,* 382 F.2d 594 (2d Cir. 1967); *Rapp v. Salt Lake City,* 527 P.2d 651, 655 (Utah 1974).

As Scanwell has not objected to the transfer of the contract count to the Court of Claims, there is no need for us to decide whether that court's theory of implied contract is correct. It is apparent that this case lies in that region of uncertainty between contract and tort which under the old common law forms of action would have allowed (indeed, forced) the plaintiff to choose the theory of his action. *See Woodbury v. United States,* 313 F.2d 291, 296 (9th Cir. 1963). While modern pleading rules have generally done away with this archaic problem, the limited scope of United States consent to suit requires a court to face it when the Government is the defendant in a suit for damages. *See Hill v. United States,* 149 U.S. 593, 598, 13 S.Ct. 1011, 37 L Ed. 862 (1893). Our solution need not, however, be to limit the plaintiff's claim to one theory or the other, but merely to prevent a double recovery, if indeed recovery is possible under either theory. *Cf.* F.R.C.P. Rule 8(e)(2).

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6. In decisions since *Heyer Products,* most notably in *Keco Industries, Inc. v. United States,* 492 F.2d 1200, 203 Ct.Cl. 566 (1974), the Court of Claims has developed standards under which a disappointed bidder may recover bid preparation costs. The court has consistently, however, denied recovery of lost profits. *See McCarty Corp. v. United States, supra* at 637, 204 Ct.Cl. at 774-75.

The GAO has recently joined the Court of Claims in providing for the recovery of bid preparation costs where "there was no reasonable basis for the agency's decision" not to award the contract to the claimant. *T & H Co.,* – Comp.Gen. –, 586 *Fed. Contracts Rpt.* E-1 (June 9, 1975).

[6] In traditional torts terminology Scanwell's claim is that (1) the Government, by the IFB and the regulations incorporated therein by implication. *G.L. Christian and Associates v. United States*, 312 F.2d 418, 424, 160 Ct.Cl. 1, 12, *cert. denied*, 375 U.S. 954, 84 S.Ct. 444, 11 L.Ed.2d 314 (1963), induced plaintiff to prepare a bid in reliance that the bid would be considered as set out in the IFB and regulations, and (2) that, after plaintiff had spent a considerable sum in preparing the bid, the Government refused to act in the manner in which it had represented it would act, causing Scanwell to lose both the money spent in preparation of its bid and prospective contract profits. To the extent that this states a tort at all,[7] it appears to be a claim for negligent misrepresentation of defendant's intentions. *See* 1 *F. Harper & F.James, The Law of Torts*, §§7.6, 7.10 (1956). (Plaintiff makes no allegation that the FAA, as opposed to Cutler-Hammer, acted with any sort of intent to harm Scanwell). What appellant says, in effect, is that the Government, in good faith but incorrectly, caused it to act in reliance on the FAA's promise that it would abide by the terms of the IFB and regulations.

[7, 8] While the Tort Claims Act is n abrogation of sovereign immunity to be liberally read when applicable, the retention of immunity in the act's exceptions must also be respected. *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69, 76 S.Ct. 122, 100 L.Ed. 48 (1955). Those exceptions, codified at 28 U.S.C. §2680, include the following:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—

7. The Tort Claims Act requires that we apply, in determining whether the United States is liable to plaintiff, "the law of the place where the act or omission occurred." 28 U.S.C. §1346(b)(1970), *see May Department Stores Co. v. Devercelli*, 314 A.2d 767, 770 (D.C.App. 1973). The actions complained of here took place at the Federal Aviation Administration offices in Washington, D.C., and it is District of Columbia Law which controls substantively. We have been unable to find any District of Columbia case which allows recovery for negligent misrepresentation.

*****

> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. . . .
>
> 28 U.S.C. §2680(h)(1970), as amended by P.L. 93-253, §2, 88 Stat. 50 (1974).

In passing on the scope of this exception, the Supreme Court has unequivocally stated "that §2680(h) comprehends claims arising out of negligent, as well as willful, misrepresentation." *United States v. Neustadt*, 366 U.S. 696, 702, 81 S.Ct. 1294, 1298, 6 L.Ed.2d 614 (1961). Scanwell's claim therefore falls within one of the exceptions to government liability of the Tort Claims Act, and was improperly dismissed by the district court against the government defendants.[8]

[9-11] But even if the tort stated in the complaint is not one of the substantive delicts excepted from coverage by 28 U.S.C. §2680(h), the so-called "discretionary exception" (28 U.S.C. §2680(a)) controls. That provision excludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused*" (emphasis added). It cannot be gainsaid that the FAA had to make some relatively high-level choices. It had to decide whether the waived requirements in

8. Our earlier decision was directed only to the issue of standing, and explicitly did not decide whether Scanwell could recover or prevail on its allegations. 424 F.2d at 873.

AIL's bid were, on the one hand, minor irregularities or mere indifferences in responsibility of the bidders, or, on the other, were essential requirements of responsiveness of the bid. It had to decide, in addition, whether to set aside all bids and to readvertise. Perhaps the agency's actual choice amounted to an abuse of discretion which could be set aside in an injunctive or declaratory action, but we think there is no doubt that there was in fact some significant degree of choice and the contracting officer's obligation was not purely ministerial. When this court said in the earlier appeal (424 F.2d at 873) that on the merits the trial court could possibly find that "there is no discretion to ignore the regulations regarding responsiveness of bids" it meant that it could well be an abuse of discretion to ignore the regulations regarding responsiveness of bids. The court was speaking in terms of the Administrative Procedure Act, 5 U.S.C. §701(a)(2), not the Tort Claims Act. *See especially* 424 F.2d at 874. Under the former statute, it is clear that agency action is reviewable (by injunction, mandamus or declaratory judgment) for abuse of discretion (5 U.S.C. §706(2)(A)), but under the latter even a gross abuse of discretion will not predicate an award of tort damages. The Administrative Procedure Act, by itself, is not a waiver of sovereign immunity in suits seeking money damages against the United States. *Warner v. Cox*, 487 F.2d 1301, 1304-05 (5th Cir. 1974); *International Engineering Co. v. Richardson*, 167 U.S. App.D.C. ——, 512 F.2d 573, 580-81 (1975). The limits of that type of consent to suit are normally found (except in admiralty cases) in the Tucker Act and the Tort Claims Act.

III.

In its complaint against Cutler-Hammer, Scanwell charges that defendant with "unfair competition and unjust enrichment." Specifically, appellant alleges that, by a policy of hiring highranking FAA employees, Cutler-Hammer had gained "undue and unfair influence with the FAA" to the detriment of plaintiff, that AIL had bid a low price (lower than the bid or cost

of other bidders) in order to gain a favored position in the current and future contract awards, and that all these actions were taken with "the intention of damaging or destroying Plaintiff as a competitor in the filed of ILS."

[12, 13] Scanwell's first claim — that relating to the hiring away of FAA employees — was effectively denied by Cutler-Hammer's answers to interrogatories, made under oath and filed concurrently with the motion to dismiss. Appellee there stated that AIL had hired only one former FAA employee, who left the agency three years before the IFB for ILS was issued and who was, by 1972, no longer employed by AIL. While Scanwell briefly protested the adequacy of AIL's response, it never filed a motion (as it did with respect to the federal defendants' answers to interrogatories) to force Cutler-Hammer to enhance or clarify its answers. The concurrent filing of the sworn-to answers with the motion to dismiss had the effect, under Rule 12(b), of turning the motion to dismiss into a motion for summary judgment under Rule 56. (The District Court, which had the motion under advisement for one year, during which time numerous other pleadings were filed, did not exclude the answers; there was ample opportunity for all parties "to present all material made pertinent to such a motion by Rule 56." F.R.C.P. Rule 12(b).) Under Rule 56, Scanwell could no longer stand on its allegations relating to improper hiring, but had to respond by counter-affidavit, or at least had to convince the court that Cutler-Hammer's response was legally insufficient to answer Scanwell's claim. Scanwell did not at all do the former, and made no serious attempt to do the second. In these circumstances, this part of the factual predicate of Scanwell's third cause of action ceased to have any legal effect.

[14-16] As to the remaining portion of Scanwell's theory of unfair competition, that is of course a recognized business tort, but it is limited in scope in a free market economy based on free and open competition for business. While certain acts, such as disparagement of a competitor's product, may be tortious when undertaken solely for the purpose of destroying the rival, they

lose their tainted status when undertaken "with the legitimate purpose of reasonably forwarding personal interest and developing trade." *Standard Oil Co. v. United States*, 221 U.S. 1, 58, 31 S.Ct. 502, 515, 55 L.Ed. 619 (1911). Scanwell's own complaint alleges that Cutler-Hammer's actions were taken to enhance its own competitive position so that, unless the methods alleged to have been used are by themselves illegal, like trademark infringement, no unfair competition action has been stated. In this connection, it is important that Scanwell did not allege that Cutler-Hammer priced below its own cost, but rather below the cost of others. Whether or not below-cost bidding for a government contract is improper (and we think it is not, *see* 50 Comp.Gen. 50, 54 (1970)),[9] Scanwell's allegation amounts only to a claim that Cutler-Hammer was the low bidder, a clearly legitimate act by a competitor.

[17-19] Unjust enrichment, on the other hand is basically an equitable remedy, in which the plaintiff is required to show not only that the defendant has received an advantage, but also that it would be unfair for him to retain that advantage as against the

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9. The Armed Services Procurement Regulations §1-311 define "buying in" as "the practice of attempting to obtain a contract award by knowingly offering a price or cost estimate less than anticipated costs with the expectation of either (i) increasing the contract price or estimated cost during the period of performance through change orders or other means, or (ii) receiving future 'follow-on' contracts at prices high enough to recover any losses on the original 'buy-in' contract." The regulation goes on to state that the practice is "not favored" and urges contracting officers to prevent it by getting firm price commitments, and by preventing recovery of the loss on the original contract through change orders or overpricing of later contracts. There is no parallel regulation in the Federal Procurement Regulations, which are applicable to the contract at issue in this case. In any event, the GAO has consistently ruled that evidence of a buy-in does not require that a bid be rejected, but merely that the loss not be recovered. *SEE* B-156888 (July 2, 1965), B-17445 (February 28, 1972), B-174184 (May 24, 1972; (unpublished decisions of the Comptroller General noted at 1 *CCH Gov't Contracts Rptr.* ¶630.60 (1973)). Even to the extent, then, that Scanwell has alleged a buy-in, and assuming that the ASPR provision would be read into the FPR, the bidder's conduct is not regarded by the relevant agencies as sufficiently unfair to prevent a contract award.

plaintiff. *Bloomgarden v. Coyer*, 156 U.S.App.D.C. 109, 479 F.2d 201, 210-11 (1973). While the remedy is sometimes applied when the plaintiff is not the person conferring the benefit on the defendant, as where a stranger augments the defendant's goods with those of the plaintiff, *see Restatement of Restitution* §1, comm. 3 (1937), it is usually necessary for the plaintiff to show that he conferred the benefit. Scanwell has alleged only that Cutler-Hammer, by its own actions, received an advantage. As a matter of law of this case, as well as of the law generally, that advantage — the contract for the ILS — did not belong to Scanwell, and would not have even if Scanwell had been the low bidder, since the Government retained the right to reject all bids. 424 F.2d at 864. On these facts, Scanwell is an improper party to ask for restitution; it gave Cutler-Hammer nothing. Furthermore, our analysis of the third count as it applies to unfair competition shows that it would not be unfair to allow Cutler-Hammer, on these allegations, to retain the fruits of the contract as against appellant. Accordingly, the district court properly dismissed the third count against Cutler-Hammer.

Affirmed.

1970 DECISION (424 F.2d 859)

[TITLE]

No. 22863.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 3, 1969.

Decided Feb. 13, 1970.

Petition for Rehearing Denied May 7, 1970.

Suit for declaratory judgment to nullify action of Federal Aviation Administration in letting a contract for instrument landing systems. The United States District Court for the District of Columbia, Bryant, J., dismissed complaint for lack of jurisdiction, and plaintiff appealed. The Court of Appeals, Tamm, Circuit Judge, held that, under Administrative Procedure Act providing that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review thereof, party, which was denied government contract for instrument landing system on account of alleged illegal activity on part of Federal Aviation Administration in letting contract to an unresponsive bidder, had standing to bring suit for declaratory judgment to determine validity of agency action.

Reversed and remanded.

1. Administrative Law and Procedure — 668
Declaratory Judgment — 292

Under Administrative Procedure Act providing that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review thereof, party, which was denied government contract for instrument landing system on account of alleged illegal activity on part of Federal Aviation Administration in letting contract to an unresponsive bidder, had standing to bring suit for declaratory judgment to determine validity of agency action. 5 U.S.C.A. §702.

2. United States — 125(5)

Administrative Procedure Act, where applicable, serves as waiver of sovereign immunity. 5 U.S.C.A. §701 et seq.

3. Administrative Law and Procedure — 754

While review of agency action under Administrative Procedure Act is not granted for action "by law committed to agency discretion," review is expressly provided for when there is an abuse of that discretion. 5 U.S.C.A. §701(a) (2).

4. Administrative Law and Procedure — 763

Where a prima facie showing of illegal agency action is made, in a proceeding brought under Administrative Procedure Act, question is uniquely appropriate for judicial determination, and a plea that such action is reserved to agency discretion will not be allowed to deny review. 5 U.S.C.A. §701(a) (2).

5. Administrative Law and Procedure — 228
United States — 127

Unsuccessful bidder, challenging legality of agency action in awarding government contract, was not required to file a claim with general accounting office before proceeding with action to secure judicial review of transaction. 31 U.S.C.A. §71.

Mr. John M. Calimafde, New York City, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, with whom Messrs. Paul H. Blaustein, New York City, and James W. Dent, Washington, D.C., were on the brief, for appellant.

Mr. Michael C. Farrar, Atty., Dept. of Justice, with whom Messrs. Thomas A. Flannery, U.S. Atty., and Alan S. Rosenthal, Atty., Dept. of Justice, were on the brief, for government appellees. Mr. Davig G. Bress, U.S. Atty., at the time the record was filed, and Mrs. Ellen Lee Park, Asst. U.S. Atty., also entered appearances for government appellees.

Mr. David V. Anthony, Washington, D.C., for appellee, Cutler-Hammer, Inc.

Before BAZELON, Chief Judge, and TAMM and MacKINNON,* Circuit Judges.

TAMM, Circuit Judge:

This is an appeal from an order entered in the district court dismissing the appellant's complaint for lack of jurisdiction. The district court was mislead by precepts which on careful examination are more rhetorical than guiding. The suit was dismissed on the ground that plaintiff lacked standing to sue; this appeal raises important questions concerning that concept.

The transaction involved resulted from the issuance by the Federal Aviation Administration of an invitation for bids (IFB) for instrument landing systems to be installed at airports to guide aircraft along a predetermined path to a landing approach. Such systems are designed to make the approach of aircraft to airports safer, a result which the FAA sought to attain by carefully circumscribing the criteria for bids in such a way as to preclude bids from producers who did not already have operational systems installed and tested in at least one location.[1]

When the bids for the instrument landing systems were opened, it was discovered that appellant's was the second lowest bid. The lowest bid was entered by Airborne Instrument Laboratory, a division of Cutler-Hammer, Inc. Appellant alleged in the district court that appellee Cutler-Hammer's bid was non-responsive to the IFB in that Cutler-Hammer did not

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*Judge MacKinnon did not participate in the disposition of this case.

1. The invitation for bids provided: "To be responsive to this request, the contractor shall submit evidence that an identical equipment complement as that proposed for this procurement has previously been installed in at least one location and has achieved at least Category 1 performance as certified by an FAA flight check. *** This shall be evidenced by the submission of a certification from the flight inspection source." (App. 6a, Annex p. 6.)

have a system installed in one location, nor did it have a certificate of performance based on an FAA flight check. Appellant therefore sought to have the action of the FAA in granting the contract to defendant Cutler-Hammer declared null and void as a violation of statutory provisions controlling government contracts and the regulations promulgated thereunder.

The Code of Federal Regulations provides:

> To be considered for award, *a bid must comply in all material respects with the invitation for bids* so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained.

41 C.F.R. §1-2.301(a) (1969) (emphasis added). The regulations go on to state that:

> *Any bid which fails to conform to the essential requirements of the invitation for bids,* such as specifications, delivery schedule or permissible alternates thereto, *shall be rejected as non-responsive.*

41 C.F.R. §1-2.404-2(a) (1969) (emphasis added).

Appellant urges that it can seek review of a contract award which is in violation of the regulations governing the issuance thereof by virtue of section 10 of the Administrative Procedure Act, 5 U.S.C. §702 (Supp. IV 1965-68), which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Appellant asserts that the action of the FAA in granting this contract to an allegedly non-responsige bidder is arbitrary, capricious and a violation of the statutory provisions governing contracting, and that it can therefore be set aside under section 10(e) of the Administrative Procedure Act, 5 U.S.C. §706 (Supp. IV 1965-68).

I. STANDING TO SUE

[1] Whether a frustrated bidder for a government contract has standing to sue, alleging illegality in the manner in which the contract was let, is a question of major importance and can be dealt with only on the basis of a thorough review of the law of standing. Much that can be easily recognized in this area cannot be defined except with the greatest difficulty.

Standing has been called one of the most amorphous concepts in the entire domain of the public law. That this statement is undoubtedly true is evidenced by the mental gymnastics through which the courts have passed in determining standing issues. Professor Davis describes the circuity of reasoning which surrounds these issues as follows:

> A plaintiff who seeks to challenge governmental action always has standing if a legal right of the plaintiff is at stake. When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether the plaintiff has a legal right, but the question whether the plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right.[2]

The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court has itself characterized its law of standing as a "complicated specialty of federal jurisdiction." United States ex rel. Chapman v. FPC, 345 U.S. 153, 156, 73 S.Ct. 609, 97 L.Ed. 918 (1953). One cannot help asking why this should be true. Is there something innately different about the standing questions which

2. 3 K. Davis, Administrative Law Treatise 217 (1958).

arise in the state courts which makes them easier of solution than their federal counterparts? Or is it true, as Professor Davis has stated, that "[t]he difference is that the federal courts have invented a law of standing that is too complex for the federal courts to apply consistently, whereas the state courts, relatively speaking, have perceived the merits of the simple proposition that those who are in fact adversely affected should be allowed to challenge"?[3]

In order to answer the question whether there is a valid basis for the complexities surrounding the federal standing criteria, it will be useful to consider the early landmark cases in this area.

A. *The Early Cases*

The most famous early cases denying standing were the companion cases of Massachusetts v. Mellon and Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), in which the Court said that the Commonwealth could not sue because its own rights were not involved, and that the individual taxpayer could not sue because the interests of the taxpayer are so "comparatively minute and indeterminable" and that the taxpayer's contentions, even if proved, would have too "remote, fluctuating and uncertain" an effect on payments out of the Treasury. 262 U.S. 487, 43 S.Ct. 597, 67 L.Ed. 1078. (The overruling of *Frothingham* in Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), will be discussed *infra.*) Thus the initial criterion for establishing standing to sue was a showing that a legal right of the plaintiff was violated. As the Court pointed out in Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 148, 44 S.Ct. 72, 68 L.Ed. 216 (1923), the plaintiff "must show also that the order alleged to be void subjects them to legal injury, actual or threatened."

A subsequent opinion by Mr. Justice Brandeis which clarified that criterion was written the following year in The Chicago

3. 3 K Davis, *supra* note 2, at 291-292.

Junction Case, 264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667 (1924). Standing was upheld therein for six competitors to challenge the validity of an Interstate Commerce Commission decision allowing the New York Central Railroad to acquire an independent terminal railroad in Chicago. The decision was attacked on the ground that there was no evidence to support a finding that the acquisition would be in the public interest as required by the statute. The Court distinguished its prior decision by stating that:

> This loss is not the incident of more effective competition. Compare Edward Hines [Yellow Pine] Trustees v. United States, 263 U.S. 143, 148 [44 S.Ct. 72, 68 L.Ed. 216]. It is injury inflicted by denying to the plaintiffs equality of treatment * * *. By reason of [the Interstate Commerce Act] the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company.

264 U.S. at 267, 44 S.Ct. at 320. Professor Jaffe has construed this case to mean that:

> Standing * * * is made to rest on a determination that an interest intended by statute to be protected has been denied that protection. It should be stated somewhat more sharply just what this did and did not mean in the context. It did not mean that there was a right that competition not be diminished. The plaintiff could not win simply by showing such dimunition. It did mean that the agency was required by the statute to have regard to competition as one factor in its decision; that it must, if it disregards the effect on competition, give a reasoned explanation. It is in this sense that the "legal right" criterion is most appropriately applied as a generalizing concept to administrative law.[4]

4. L. Jaffe, Judicial Control of Administrative Action 507-508 (1965).

A clear statement of the bases of this principle is found in the Court's subsequent opinion in Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-138, 59 S.Ct. 366, 83 L.Ed. 543 (1939):

> The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for the statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. *The principle is without application unless the right invaded is a legal right, — one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.* (Emphasis added.)

This case held that a private electric producer did not have standing to challenge governmental subsidy of competition. This line of cases securely entrenched the legal right doctrine in the federal law of standing. Inconsistencies resulting from this doctrine are readily apparent.[5]

The need for a broader criterion was met by the decision of the Court in FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940), which is the leading case on the "person aggrieved" criterion for standing to sue. With this case the broader concept of standing gained tremendous ground. In *Sanders* the Court granted standing to a plaintiff who could not demonstrate an infringement of a legally protected right. This the Court did through its interpretation of the Communications Act of 1934, saying of section 402(b) (2) thereof:

> [Congress] may have been of the opinion that one likely to be financially injured by the issue of a license would

5. *See, e.g.*, Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249, 50 S.Ct. 315, 74 L.Ed. 832 (1930), a case in which Mr. Justice Brandeis held that appellant had standing to be a party to an administrative proceeding before the ICC because it had a "distinct interest in the proceeding," but that it did not have standing to appeal the Commission's order because it was not "subjected to or threatened with any legal wrong." 281 U.S. at 254, 257, 50 S.Ct. at 318.

> be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.

309 U.S. at 477, 60 S.Ct. at 698.

The only apparent difference between *Tennessee Electric Power* and *Sanders* is that in *Tennessee Electric* there was no statutory provision granting judicial review to the courts, whereas in the latter case there was such an express provision. If this is true, the "legal right" doctrine is certainly dead wherever there is express "person aggrieved" language in the relevant statute, and there is a strong argument for the proposition that the same result should obtain when section 10 of the Administrative Procedure Act applies.[6]

At this point in the development of the law of standing the Court evidently perceived the need to promulgate a standard which would provide redress for legitimate grievances in cases in which the plaintiff asserted a position which protected a public rather than a specific private interest; for this purpose it was recognized that the legal right doctrine was needlessly harsh and restrictive. Thus the Court made clear in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14, 62 S.Ct. 875, 86 L.Ed. 1229 (1942), that "these private litigants have standing only as representatives of the public interest." In using these words to find that a radio station which would in all probability suffer economic injury if the FCC granted a rival license was a person aggrieved under the statute, the Court opened the door to the next logical step, which Judge Frank took the following year.

In Associated Industries of New York State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707, 64 S.Ct. 74, 88 L.Ed. 414 (1943), Judge Frank, after emphasizing the above-quoted language from *Scripps-Howard*, said:

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6. *See* 3 K Davis, *supra* note 2, at 221.

> [W]e believe that the usual "standing to sue" cases can be reconciled with the Sanders and Scripps-Howard cases, as follows: While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of is statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and *there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest.* Such persons, so authorized, are, so to speak, private Attorney Generals. (Emphasis added.)

This court has read the above language with approbation. in National Coal Ass'n v. FPC, 89 U.S.App.D.C. 135, 191 F.2d 462 (1951), Judge Bazelon, speaking for the court, said:

> We agree with the rationale which [the *Ickes*] case draws from the Supreme Court's decisions in the Sanders and Scripps-Howard cases: "* * * one threatened with financial loss through increased competition resulting from a Commissioner's order is 'aggrieved.' * * * The " 'person aggrieved' review provision [is] a con-

> stitutionally valid statute authorizing a class of 'persons aggrieved' to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. * * *"

89 U.S.App.D.C. 137, 191 F.2d 464-465.

In essence this is precisely what the appellant sought to do in the case at bar; there is no right in Scanwell to have the contract awarded to it in the event the district court finds illegality in the award of the contract to LerHammer. Thus the essential thrust of appellant's claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."

For this reason one of the things implicit in Judge Frank's statement strikes us as being of the utmost importance: When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests, while at the same time furthering the public interest. These are the people who will really have the incentive to bring suit against illegal government action, and they are precisely the plaintiffs to insure a genuine adversary case or controversy. As the Supreme Court has recently said, the need is for parties with "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination" of complex legal issues. Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

B. *The Administrative Procedure Act*

The law of standing was greatly modified by the passage of the Administrative Procedure Act, 5 U.S.C. §§551-706 (Supp. IV 1965-68), section 10 of which states that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §702 (Supp. IV 1965-68).

It has been forcefully argued that the legislative history of this section can be reasonably interpreted to support the "aggrieved in fact" theory because that language appears in the reports of both the Senate and House committees; in each the statement is found that "[t]his subsection confers a right of review upon any person adversely affected *in fact* by agency action or aggrieved within the meaning of any statute."[7] This language did not appear in the statute itself, however, and the Attorney General stated that the provision was reflective of existing law.[8]

In order to meet the objections of various parties to language in the statute, the Senate Report which accompanied the Act stated that:

> (1) One agency objects to the recognition of a right of review in public contract and other cases where Congress has not specifically provided for judicial review. But * * * the so-called nonstatutory or common-law type of review was recognized by the Attorney General's Committee as properly obtaining wherever special statutory review is not provided by Congress and legislation does not indicate that judicial review is precluded or withdrawn. The exceptions stated in the introductory clause of section 10 appear to set forth the

7. S. Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946) (emphasis added).
8. *Id.* at 310.

> proper type of issues not subject to judicial review. *If a party can show that he is "suffering legal wrong" as provided in subsection (a), he should have some means of judicial redress.*

S. Doc. No. 248, 79th Cong., 2d Sess. 37-38 (1946) (emphasis added).

The view that the Act was reflective of existing law was supported by the opinion of this court in Kansas City Power & Light Co. v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924 (D.C.Cir.), cert. denied, 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955), in which Judge Washington stated that the section was declaratory of existing law. The weight of that decision has been greatly reduced, however, by the decision of the Supreme Court in Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7, 88 S.Ct. 651, 19 L.Ed. 2d 787 (1968), in which the Court held that there was no requirement for a specific statutory grant of standing in actions by competitors to enforce statutes protecting competitive interests. The interpretation of the *McKay* case is further weakened by the language of the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 140-141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), in which Mr. Justice Harlan said for the Court:

> [] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off *unless there is persuasive reason to believe that such was the purpose of Congress.* * * * Early cases in which this type of judicial review was entertained, *e.g.*, Shields v. Utah Idaho Central R. Co., 305 U.S. 177 [59 S.Ct. 160, 83 L.Ed. 111]; Stark v. Wickard, 321 U.S. 288, [64 S.Ct. 559, 88 L.Ed. 733], have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action * * *." The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has

> echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. * * * [I]n Rusk v. Cort, [369 U.S. 367, 82 S.Ct. 787, at 794, 7 L.Ed.2d 809 (1962)] * * * at 379, 380, the Court held that *only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.* (Emphasis added.)

There is no evidence of a contrary legislative intent which affects the appellant's position in the current case. If anything, the legislative intent with respect to the field of government contracting in general seems to run in precisely the opposite direction, that is, in favor of review.

Appellee makes much of the Supreme Court's decision in Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940), in which the Public Contracts Act was interpreted to be an enactment for the protection of the government rather than for those contracting with the government. The plaintiff in that case was therefore denied standing to secure review of wage determinations allegedly arrived at as a result of erroneous statutory interpretation.

It must be remembered that *Perkins* was decided during the heyday of the legal right doctrine, and before the passage of the Administrative Procedure Act. The Court therefore followed the reasoning of its earlier cases in declaring:

> We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction * * * was based * * *. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.

310 U.S. at 125, 60 S.Ct. at 875. Professor Davis has very discerningly seen the fallacy of the Court's thinking in this decision and has devised a more logical and more consistent

basis for viewing such situations:

> What the court did not inquire into in the Lukens opinion is why the companies which are adversely affected by the asserted misinterpretation of the statute should not be enlisted as natural law enforcers, whether or not a legal right of the companies is violated. The opinion was written in terms of what "the Government" may do in making contracts; a more refined view would be that government officers were making contracts on behalf of the government, that Congress is also a participant in the exercise of the government's proprietary functions, and that the most practicable way to keep the government's contracting officers within their statutory powers is by letting complainants like those in the Lukens case obtain judicial review of the officers' action.[9]

This is a powerful argument for allowing the plaintiff in the current case the requisite standing to challenge the governmental action of which it complains. Regardless of the merits of plaintiff's case, it should be granted the right, if possible, to make a prima facie showing that the government's agents did in fact ignore the Congressional guidelines in the manner in which they handled the granting of the contracts. If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits, at least until or unless this country adopts the *ombudsman* system used so successfully as a watchdog of government activity elsewhere.

Appellee's reliance on *Perkins* is ill founded. In 1952 the Walsh-Healy Public Contracts Act was amended; during floor debate on the Fulbright Amendment, 66 Stat. 308, 41 U.S.C. §43a (1964), its proponent said:

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9. 3 K. Davis, *supra* note 2, at 220.

> Mr. FULBRIGHT. *** There has been no reasonable means by which interpretations might be challenged. It was tried in the Lukens steel case, in which it was held that the parties seeking to challenge the interpretation had no standing in court to do so. *It is our purpose, by this amendment, to overturn that decision.*
>
> Mr. SALTONSTALL. So, *the amendment* of the Senator from Arkansas, we hope, *will provide a fairer procedure than the procedure now in effect.*
>
> Mr. FULBRIGHT. *That is correct. That is the intention.* It is simply intended to give a judicial review of the questions referred to by the Senator from Rhode Island, and others which may arise.
>
> *****
>
> Mr. PASTORE. *I was hoping that the author of this amendment would really give a liberal construction as to what might be meant by "an aggrieved person." I think I understand the Senator correctly, that anyone who feels himself aggrieved, even though he may not be directly connected with the particular case, might go to court and have the question determined by the court upon review.*
>
> Mr. FULBRIGHT. The Senator gets into a very technical question, there, as to whether there is a controversy involved, under the Constitution. I do not think that I could shed much light upon that. But *that matter would be submitted to the court for decision as to whether there was a sufficient set of circumstances to support a case.*

98 Cong. Rec. 6531 (1952) (emphasis added). This somewhat lengthy excerpt from the Congressional Record is made both to show that the basic approach of the Supreme Court in the *Perkins* case has been legislatively reversed by the Congress and to demonstrate the Congressional intent that certain matters

arising under the Public Contracts Act will be given specific judicial review by Congressional fiat. Given this statement of intent on the part of the Congress, can it be said that to grant standing to the plaintiffs in the current cases would go against the will of the Congress? Does not this phraseology constitute a liberation from the bonds of *stare decisis?* We hardly think a contrary argument can stand in the face of the quoted language. Clearly the Congress favors review for those who are likely to be injured by illegal agency action in the context of government contracting.

This court had occasion to review the amendments to the Walsh-Healy act in Wirtz v. Baldor Elec. Co., 119 U.S.App. D.C. 122, 337 F2d 513 (1963), in which it was said:

> It is clear that the statutory language saying that persons adversely affected shall be deemed to include "any manufacturer", *et cetera,* was inserted for the purpose of specifically negating the Supreme Court's holding in Perkins v. Lukens Steel, [310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108] * * * and was not intended to confer standing upon every manufacturer or dealer in an industry, whether or not he was adversely affected .
>
> Thus, *the amendment was intended to bestow litigable rights upon those who need "protection against arbitrary actions," i.e., as the statute says, those adversely affected or aggrieved. Manufacturers and supplies were specifically mentioned in the statute in order to reject clearly the Supreme Court's holding that notwithstanding an adverse effect the parties had no litigable rights.*

119 U.S.App.D.C. at 136-137, 337 F.2d at 532-533 (emphasis added).

The court found this to be the purpose of the amendment largely on the basis of Senator Fulbright's statement that:

> The second part of my amendment provides for judicial review * * * as a protection against arbitrary

> actions of the Secretary of Labor. It is made necessary by the decision of the Supreme Court in the Lukens Steel case. This case held that courts have no jurisdiction since no rights of the contractors were involved — doing business with the Government was a privilege and not a right.

98 Cong.Rec. 6246 (1952).

This portion of the legislative history of the amendments to the Public Contracts Act shows without question that there is not only no Congressional intent to limit review under that Act but rather that there is actually an affirmative intent of the legislature to grant review in circumstances which warrant it. Indeed, one of the primary effects of the Fulbright Amendment was to make the Administrative Procedure Act specifically applicable.

The trend of cases, both in this Circuit and in the Supreme Court, indicates that allegations of illegality such as those made by the appellant in the current case are a sufficient basis for standing. This court had occasion to review the application of the Public Contracts Act in Friend v. Lee, 95 U.S.App.D.C. 224, 221 F.2d 96 (1955), and delimited standing under its provisions in the following terms:

> Plaintiff contends that the contract between the defendants and Avis is illegal on the ground that it was entered into without previous advertising for proposals, as 41 U.S.C.A. §5 requires. But assuming *arguendo* that the statute is applicable and may have been violated, plaintiff, nevertheless, has no standing to sue to invalidate the contract. Statutes regulating the contracting procedures of officers of the Federal Government are enacted solely for the benefit of the Government and confer no enforceable rights upon persons dealing with it. Perkins v. Lukens Steel Co., 1940, [310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108] * * * In consequence, plaintiff cannot contest the award of the contract to

Avis, either as a bidder or in his capacity as a citizen generally. * * *

*****

* * * Contracting officers of the Federal Government have the duty to select the contract most advantageous to the Government, and advantage is not measured exclusively in terms of price; it includes other factors such as judgment, skill, ability, capacity and integrity. * * * The final selection of a contractor involves discretion and is not subject to review by the judicial branch of the Government. * * * Since plaintiff has alleged no facts which tend to show that defendants have through conspiracy, fraud, malice or coercion abused their discretion in awarding the contract, Alabama Power Co. v. Ickes, 1938, [302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374] * * * does not suggest a different conclusion. ***

*****

We do not need to determine for the purposes of the instant case whether plaintiff has standing to sue under Section 10 of the Administrative Procedure Act * * * as a person suffering a legal wrong, i.e., the arbitrary destruction of his business, or whether the court may proceed in the exercise of its general equitable powers. *Suffice it to say, that where, as here, there is a prima facie showing of arbitrariness on the part of Government officials in regulatory action taken by them, sufficient to threaten substantial injury to the party affected, the injured party is entitled to be heard.*[10]

10. This somewhat lengthy recital of the *Friend* opinion is necessary to demonstrate the marked difference between that case and the present case. The point made in *Friend* is that the selection of people with whom the government will enter into a contract is a matter of discretion when it involves considerations of price, judgment, skill, ability, capacity and integrity, and we agree with that analysis. The point on which we distinguish that case is that here we have a situation in which explicit requirements of the bid were waived by the agency; this results in an allegation of arbitrary and capricious misconduct, an allegation not made in *Friend*. Further, in the quoted excerpt from the opinion which dealt with the operation of the airport, as opposed to the granting of the concession, the court pointed out that a prima facie showing of arbitrariness would be sufficient to entitle the plaintiff to a hearing, even in the absence of the specific language of the Administrative Procedure Act. What we do here merely points out that with a prima facie showing of abuse of discretion and with the language of the Administrative Procedure Act in full application, a plaintiff does pave standing to sue.

95 U.S.App.D.C. at 227-229, 221 F.2d at 100-102 (emphasis added). This case is clearly on point and, contrary to appellees' arguments, supports in very explicit terms the position of the appellant.

It is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties. It is also incontestible that that discretion may not be abused. Surely there are criteria to be taken into consideration other than price; contracting officers may properly evaluate those criteria and base their final decisions upon the result of their analysis. They may not base decisions on arbitrary or capricious abuses of discretion, however, and our holding here is that one who makes a prima facie showing alleging such action on the part of an agency or contracting officer has standing to sue under section 10 of the Administrative Procedure Act.

We recently held that a party who submitted a sealed bid for the purchase of oil leases could challenge the grant of the leases to a bidder whose documents were not signed. Superior Oil Co. v. Udall, 133 U.S.App.D.C. 198, 409 F.2d 1115 (1969). It is noted in that case that the Comptroller General has said that:

> "* * * *when a bid is nonresponsive in a material respect, it cannot be corrected even though the nonresponsiveness may be due to mistake or oversight.*"

(133 U.S. App. D.C. at 203, 409 F.2d at 1120; emphasis in original.) In allowing that suit without denying standing to Superior Oil because it was a competitive bidder for a govern-

ment contract, the court impliedly held that such persons have standing to sue in the event the contract is illegally awarded. This case is clearly on point and materially assists the appellant's case. More recent statements of this court which specifically relate to the standing issue are also relevant.

Subsequent to the Superior Oil decision this court had the opportunity to review important questions of standing in National Ass'n of Securities Dealers, Inc. v. SEC, 136 U.S.App.D.C. 241, 420 F.2d 83 (1969), petition for cert. filed, 38 U.S.L.W. 3185 (Nov. 18, 1969). Although the court could not agree in that case on the precise basis for granting standing to the plaintiffs it stated in the brief *per curiam* portion of the opinion that "[w]hile a majority of the court has reservations about standing, these doubts have been resolved in favor of reaching the merits in cases of this consequence." 136 U.S.App.D.C. at 242, 420 F.2d at 84. Here again is a statement, this time by this very court, which indicates that the criteria for standing in the federal system are so amorphous that even the judges of the United States Courts of Appeals are in doubt as to the proper guidelines to be followed. We think it time that such doubts were resolved in favor of hearing cases in which the public interest demands a hearing on the merits. As Chief Judge Bazelon said in his concurring opinion (136 U.S.App.D.C. at 254, 420 F.2d at 96):

> the basic justification for entertaining competitors' suits to challenge administrative action as statutory aggrieved parties, intended beneficiaries, or licensees is to vindicate a public interest, and not a private right. The absence of a statutory aid to standing in this case is adventitious, and I would grant appellants standing to assert the public interest without it.

The issue of standing to sue was next raised in this court in Air Reduction Co., Inc. v. Hickel, 137 U.S.App.D.C. 24, 420 F.2d 592 (1969). In that case the court specifically met the contention that the regulations of the Secretary of the Interior are beyond

challenge even if not Congressionally authorized, and granted standing to a competitor to protest regulations applicable to purchases of helium by contractors of federal agencies as being beyond the power of the Secretary. This case is analogous to the present case in which the appellant seeks to challenge an exercise of discretion on the part of a government contract official as being beyond his statutory authority. In *Air Reduction* the court was not called upon to pass on the standing of the competitor under the Administrative Procedure Act. Rather, in that case the appellee was held to be specifically within the scope of the court's ruling in Gonzalez v. Freeman, 118 U.S.App.D.C. 180, 334 F.2d 570 (1964), which held that standing exists in one who currently has a beneficial business relationship for supplying the needs of the government to challenge the unlawful termination of that relationship. This case expands on the logic of that decision; here we hold that one who has a prospective beneficial relationship has standing to challenge the illegal grant of a contract to another, which is precisely what this court did in Superior Oil v. Udall, *supra* p. 869.

Climaxing the growing trend of cases in this jurisdiction which have expanded the criteria for granting standing to sue by virtue of a recognition of the logic of the aggrieved-in-fact criterion is the recently decided case of Curran v. Laird, 136 U.S.App.D.C. 280, 420 F.2d 122 (1969) (*en banc*). Although the majority in that case found that the appellant had standing because of a legally protected right under the Merchant Marine Act of 1936 and the Cargo Preference Act, which evidenced a statutory intent to protect American seamen against foreign competition, the majority did say that:

> Obviously no simple touchstone can be provided for determination of standing questions. Each case turns on the nature of the parties, the grievances and the statutory provisions involved. However, it is clear that with the approach charted in *Abbott Laboratories*, a person aggrieved in fact may properly invoke not only the letter of the Administrative Procedure Act and its

> "generous" review provisions, but *a broad conception that Congress is "hospitable" to the maintenance of complaints against officials charged with disregarding its substantive mandate.*

136 U.S. App. D.C. at 284, 420 F.2d at 126 (emphasis added).

There are no Supreme Court cases which go directly to confirming an expanded role for section 10 of the Administrative Procedure Act in this context. However, Professor Davis has pointed out several recent Supreme Court cases which find standing simply on the basis that the plaintiff has suffered a "palpable injury."[11]

In Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963), for example, publishers of books discontinued by wholesalers at the admonition of defendant Rhode Island Commission to Encourage Morality in Youth were allowed to sue, the Court saying that:

> [P]ragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied.

372 U.S. at 65 n. 6, 83 S.Ct. at 636 n. 6.

The Court also allowed suit in Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961), on the ground of palpable injury to the plaintiff, a public school teacher who was allowed to sue for an injunction and declaratory judgment that a loyalty oath was unconstitutionally vague. As Professor Davis has pointed out, the holding of that case is

11. 3 K. Davis, *supra* note 2, (Supp. 1965 at 51-52).

clearly inconsistent with the language of Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543, *supra* p. 863, which held that one threatened by injury from governmental action could not challenge that action "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." It has been suggested that such a provision has always been unsound and is no longer valid in light of the recent trend of cases.[12]

The final case cited which rests upon a finding of a "palpable injury" but nothing more is City of Chicago v. Atchison, Topeka & Santa Fe R. Co., 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958). In that case the Court said that "[i]t is enough, for purposes of standing, that we have an actual controversy before us in which [the plaintiff] has a direct and substantial personal interest in the outcome." 357 U.S. at 83, 78 S.Ct. at 1067. This holding is also obviously inconsistent with the holding in *Tennessee Electric Power Co.*

It may well be argued that the Supreme Court has applied this broadened theory of standing only in situations in which the plaintiff had a constitutional right which was being infringed. It will therefore be argued that these decisions are quite narrow, as is the decision in Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), although this decision has been touted as the case which will lead to the downfall of traditional notions of standing. *Flast*, which overrules, at least in part, Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), does rest on a narrow and carefully devised "nexus" between two constitutional provisions:

> [W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional

12. 3 K. Davis, *supra* note 2, at 255.

> provisions which operate to restrict the exercise of the taxing and spending power.

392 U.S. at 105-106, 88 S.Ct. at 1955. In order to meet this nexus the taxpayer must establish his status and the type of legislation which is being challenged on the one hand, and on the other he must allege a violation of a constitutional provision which specifically limits the authority under which the challenged legislation was passed. Obviously the precise holding of this case is very narrow, but it does point the direction through a careful delineation of the issues properly raised by standing questions. Thus the Court pointed out that:

> Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. *The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.*

392 U.S. at 99, 88 S.Ct. at 1952 (emphasis added). The Court went on to say that the principal question is whether there is a "proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.* at 100, 88 S.Ct. at 1952. Thus, even though a party may have standing, the courts will sometimes be forced to decline to pass on his request for review because the subject matter is not properly reviewable. The Court therefore concluded that:

> [I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

Id. at 101, 88 S.Ct. at 1953.

It seems clear to us that, although this language was used in the context of a case deciding constitutional issues, it addresses itself to situations in which no constitutional question may be

presented. A person injured by governmental activity which goes to non-constitutional areas of his well-being is just as interested in judicial review of that activity as one whose constitutional rights are being trammeled, and we perceive no logical reason for denying standing to one whose rights in the latter area are denied while granting standing to one who challenges activity which infringes rights in the former area.

Thus, in spite of the fact that the Supreme Court has not yet chosen to hold that the Administrative Procedure Act applies to all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language, it is clearly the intent of that Act that this should be the case. The undermining of this court's narrow construction of that statute in the *McKay* case through the *Hardin* case and the "hospitable" view which the Court has recently taken of construction of its provisions in *Abbott Laboratories* leads us to believe that a decision for standing is both sound law and in accord with the recent trend of decisions in the Supreme Court.

Of course it is true that the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits will be averted. There must be a practical separation of the meritorious sheep from the capricious goats—a recognition that *cucullus non facit monachum.* However, responsible federal judges will be able to discern a case in which there is injury in fact, a sufficient adversary interest to constitute a case or controversy under Article III, and an otherwise reviewable subject matter to prevent the dockets from becoming overcrowded. The court should have discretion to grant standing, provided the other criteria listed above are properly met.

The spectre of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue. Certainly the same hue and cry went up when the states relaxed the criteria for standing to sue; but so far the dockets in the states have not increased appreciably as a result of new cases in which standing would previously have been

denied.[13] We agree with the analysis of our sister circuit in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 617 (2d Cir. 1965), *cert. denied. sub nom* Consolidated Edison Co. of New York, Inc. v. Scenic Hudson Preservation Conference, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed. 2d 540 (1966):

> We see no justification for the Commission's fear that our determination [granting standing] will encourage "literally thousands" to intervene and seek review in future proceedings. We rejected a similar contention in Associated Industries, Inc. v. Ickes * * * noting that "no such horrendous possibilities" exist. Our experience with public actions confirms the view that the expense and vexation of legal proceedings is [*sic*] not lightly undertaken.

The fundamental problem is that the early cases, in rhetoric always impressive but in understandibility often determinedly so obscure as to deftly puncture the bubble of that very rhetoric, gave birth to an unruly concept. It has been pointed out that:

> The cases indicate no appreciable difference between one who has an "interest," one who is "adversely affected," and one who is "aggrieved." True, each concept becomes a receptacle for ideas about standing, but what is read into any one concept could just as readily be read into either of the others.[14]

This leads to the unfortunate and intolerable result that:

> One who is seriously harmed by reviewable administrative action which is illegal or even unconstitutional is often denied judicial review on account of lack of standing. The law of standing is fundamentally artificial to the extent that one who is in fact harmed by administrative action is held to lack standing

13. 3 K. Davis, *supra* note 2, at 294.

14. 3 K. Davis, *supra* note 2, at 216.

> to challenge the legality of the action. The artificiality—frequently running counter to natural instincts of judges—results in a complexity that is so great that the Supreme Court often violates the principles that the Court has laid down for its own guidance.[15]

Of course we make no decision regarding the merits of the appellant's case; the language of this opinion should not be construed in any way to make any judgment as to the correctness of appellant's allegations. The complaint herein was dismissed as a matter of law for insufficiency under Rule 12 of the Federal Rules of Civil Procedure; we must therefore treat the allegations thereof as being true in the light most favorable to appellant. It may well be that the district court, after a full hearing on the merits, will conclude that appellee Shaffer, through his agent, properly exercised discretion in awarding the contract in question, if indeed there was discretionary action to be taken. That court may find, on the other hand, that the contract was illegally awarded because there is no discretion to ignore the regulations regarding responsiveness of bids. In reaching the correct analysis of the threshold question of standing the court must look not to the merits of the petitioner's case but rather to his status. *See* Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968).

II SOVEREIGN IMMUNITY

The argument that this suit is barred by the doctrine of sovereign immunity, a proposition urged below in the motion to dismiss, is erroneous.

[2] Having found the provisions of section 10 of the Administrative Procedure Act applicable, the court is persuaded that the ancient doctrine of sovereign immunity has no application. The Fifth Circuit has held that the Administrative Procedure Act, where applicable, serves as a waiver of sovereign

15. *Id* at 210.

immunity. In Estrada v. Ahrens, 296 F.2d 690, 698 (1961), that court said:

> By providing judicial review in an action brought by "any person adversely affected or aggrieved by any agency action" Congress permitted suits which under established tests would certainly be barred as suits against the government. * * * *The Act thereby makes a clear waiver of sovereign immunity in actions to which it applies.* (Emphasis added.)[16]

It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory.

III. ADMINISTRATIVE DISCRETION

In denying the appellant's motion for summary reversal this court requested that the parties brief the standing issue and the question of whether, assuming the appellant was found to have standing, the Administrator's decision was nevertheless "committed to agency discretion" as provided in 5 U.S.C. §701(a)(2) (Supp. IV 1965-68).

[3] The problem illustrated by appellee's apparent misconception of the nature of issues reserved to agency discretion is resolved by a careful reading of the various parts of section 10 of the Administrative Procedure Act; while review is not granted for action "by law committed to agency discretion," as noted in

16. *See* Adams v. Witmer, 271 F.2d 29, 34-35 (9th Cir. 1958); Powelton Civic Home Owners Ass'n v. Dep't of Housing & Urban Dev., 284 F.Supp. 809, 834 (E.D. Pa.1968); *see also* 3 K. Davis, *supra* note 2, at 434-47; H. Hart & H. Wechsler, The Federal Courts and the Federal System, 1161-63 (1953); Cahn & Cahn, The New Sovereign Immunity, 81 Harv.L.Rev. 929 (1968); Note, Administration of Claims Against the Sovereign—A Survey of State Techniques, 68 Harv.L.Rev. 506 (1955).

section 701(a) (2), review is expressly provided for when there is an abuse of that discretion:

> *Scope of review.* * * * [The reviewing court] shall * * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *.

5 U.S.C. §706(2) (A) (Supp. IV 1965-68). As this court recently observed in Curran v. Laird, 136 U.S. App. D.C. 280, 420 F.2d 122 (1969) (*en banc*), in discussing section 701(a) (2), there is a "general rule that official administrative action is reviewable in courts when a person claims injury from an act taken by a government official in excess of his powers." (136 U.S. App. D.C. at 286, 420 F.2d at 128.)

As we have noted above, it is incontestable that many areas of government contracting are properly left to administrative discretion; the courts will not invade the domain of this discretion, but neither can the agency or official be allowed to exceed the legal perimeters thereof. Contracting officials can exercise discretion upon a broad range of issues confronting them; they may not, however, opt to act illegally. When the bounds of discretion give way to the stricter boundaries of law, administrative discretion gives way to judicial review.[17]

The regulations of the Federal Aviation Administration have the force of law. Stork v. United States, 278 F.Supp. 869, 875-876 (S.D. Calif. 1967). The procurement regulations also have the force of law. Paul v. United States, 371 U.S. 245, 255, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963). When a prima facie showing of the violation of those regulations has been made the agency may not be heard to say that the matter in question has been left to its discretion.

17. For a general analysis of this entire problem *see* Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L.J. 965 (1969); *compare* Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968).

Appellee Cutler-Hammer argues that the discretion of the Administrator to reject all bids is controlling. Robert F. Simmons & Assoc. v. United States, 175 Ct. Cl. 510, 360 F.2d 962 (1966). This case is inapposite. While he may very well have the power to reject all bids if he deems such action to be in the public interest, he may not award a contract illegally under the guise of discretionary action.

For the same reason appellee Shaffer is incorrect in his reliance on the argument that the nature of the decision to be made in the federal procurement process places determinations made therein beyond the scope of judicial review. The argument is made that these

> determinations necessarily involve "questions of judgment requiring close analysis and nice choices," Panama Canal Co. v. Grace Line, 356 U.S. 309, 318, 78 S.Ct. 752, 758, 2 L.Ed.2d 788 [1958], which cannot be judicially reviewed. * * *

(Brief for Appellee Shaffer at 20). The brief goes on to cite in the margin the words of Mr. Justice Frankfurter, concurring in Driscoll v. Edison Light & Power Co., 307 U.S. 104, 122, 59 S.Ct. 715, 724, 83 L.Ed. 1134 (1939), to the effect that disputes involved in such cases do "not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment." In the current case the questions presented go precisely to the legality of the administrative action; the courts are more "peculiarly competent" to decide such questions than anyone else.

[4] We therefore hold that where, as here, a prima facie showing of illegality is made, the question is uniquely appropriate for judicial determination; a plea that such actions are reserved to agency discretion will not be allowed to deny review.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

At oral argument the question of exhaustion of administrative remedies was raised from the bench and the parties were asked to file supplemental memoranda on this point. On the basis of those memoranda and after much independent research, the court is of the opinion that complaints such as that involved in the case at bar are properly raised in the district court.

[5] The agency action of which the appellant seeks review is final—appellant Scanwell's bid has been rejected and the contract awarded to Cutler-Hammer. While it is true that appellant could have petitioned the Comptroller General for review of the award under the provisions of 31 U.S.C. §71 (1964),[18] there is no requirement that this action be taken prior to seeking review of the agency's final order in the district court. This provision and the regulations promulgated thereunder, 4 C.F.R. §§ 31.1-31.8 (1969), are designed to provide procedures through which claims on behalf of or against the government are to be settled. While claims arising out of contracts with the government are clearly covered, it would require distorted statutory interpretation for us to hold that a bidder who challenges the legality of agency action in awarding a contract is *required* to file a claim with the General Accounting Office before proceeding with action to secure judicial review of the transaction.[19]

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18. This section provides that "[a]ll claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

19. The regulations relating specifically to bid protests are also permissive rather than mandatory in nature:

> An interested party wishing to protest the proposed award of a contract, or the award of a contract, *** *may* do so by addressing a telegram or letter to the Comptroller General of the United States *** identifying the procurement *** concerned and stating the specific grounds upon which the protest is based.

4 C.F.R. §20.1 (1969). The reasonable interpretation of this regulation is that this is one means by which a protest may be made; the nature of the

One of the basic purposes of the exhaustion doctrine is to provide a full and complete record upon which the court can base its review of the administrative action. The regulations governing the settlement of claims under the Comptroller General's authority specifically state that:

> Claims are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. Settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record. The burden is on the claimants. * * * The settlement of claims is based upon the written record only.[20]

With this framework for review of agency action we fail to understand appellee's argument that one is required to seek review in the General Accounting Office in order to meet the requirements of the exhaustion doctrine. While this may serve as a useful alternative procedure under certain circumstances, it is not a prerequisite to court review. The district court will have the benefit of the record upon which the Comptroller General would rely. No additional findings of fact would be made and no hearings would be held; there would therefore be no additional groundwork laid for the court to review. Under the circumstances, and given the fact that the questions under review are legal questions, we think that the appellant may properly bring the action in the district court.

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procedure which such a protest starts is indicative of the fact that this is not the sole avenue of protest available.

20. 4 C.F.R. §31.7 (1969).

V. CONCLUSION

For the foregoing reasons we hold that appellant has standing to bring suit in the district court, that its suit is not barred by considerations of sovereign immunity, administrative discretion, or failure to exhaust administrative remedies, and that the case will be remanded to the district court for a hearing on the merits of appellant's claim.

Reversed and remanded.

[LETTERHEAD OF SCANWELL LABORATORIES]

13 February 1969

Department of Transportation
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20590

Att. Mr. Samuel Rabinowitz, Chief, Procurement Operations Div., LG-200

Subject: IFB WASM-9-0366B1

Gentlemen

The purpose of this letter is to object to consideration of a bid submitted by Airborne Instruments Laboratory (AIL) and to state in the strongest terms possible that acceptance of AIL's bid would be in disregard of the reasons underlying the many recent air crashes which gave rise to the specific invitation for Bid (IFB).

The IFB of AIL should be rejected as non-responsible on its face, and should also be rejected as not in the best interests of public safety.

The IFB Schedule specified a complement of equipment consisting of:

1. Single equipment localizer station,
2. Single equipment glide slope station,
3. Two marker beacon stations (outer and middle), and
4. Remote indicator and control equipment.

The schedule requires that equipment to be furnished shall meet all performance requirements in ICAO Annex 10 applicable to Category I ILS.

Under the IFB, *to be responsive*, the contractor must submit evidence that,

a. An identical equipment as that proposed for this procurement has previously been installed in at least *one* location and has achieved at least Category I performance as certified by an FAA flight check.

b. The flight check shall be evidenced by the submission of a certification.

The IFB of AIL was *not* responsive for the following reasons:

1. The Schedule requires that "identical equipment" as that proposed have previously been installed in at least one location; the equipment being that enumerated in paragraphs 1-4 hereinabove. *That equipment has not been installed in any one location.*

AIL has installed partial equipment in Blythe, California, consisting of items 1, 2, and part of 3; i.e., a localizer station, glide slope station, and only an outer marker. AIL installed other partial equipment in Latrobe, Pennsylvania, consisting of Items 1, 3, and 4; i.e., localizer, two marker beacon stations, and remote indicator and control equipment. At neither station, however, did AIL have a complete Instrument Landling System as required in the IFB.

For this reason alone, the bid is unresponsive. It is incomprehensible that FAA contemplated piecemeal installation as compliance with the IFB which imposed stringent requirements.

2. The Flight Inspection Report of the Blythe installation attached to the AIL bid manifestly is not a certification of Category I performance for the following reasons:

a. The report shows a "special" inspection of only the localizer, glide slope, and outer marker and an incomplete system);

b. The report shows modulation of 22.5%, which exceeds U.S.S.F.I.M. and ICAO Annex 10 Category I tolerances;

c. The report shows the localizer performance category was not rated at all (Box 8 in report form);

d. The glide slope performance category was not rated at all (Box 9 in report form);

e. The report shows that the equipment was not rated for certification (Box 13 of report form);

f. The lower left hand box shows that the inspection officer did not consider the equipment even adequate for a "Facility Classification";

g. Page 2 of the Report reveals an evaluation that would be intolerable for commercial airliners. Consider, for example,

1. The second paragraph which finds a drifting modulation to 22.5% by the third day, which exceeds Category I tolerance;

2. The fourth paragraph states that no monitor check was made on either the localizer or glide slope;

3. The fifth paragraph, referring to glide modification, indicates instability;

4. The penultimate paragraph states that the report is not a comprehensive check. This is the very antithesis of a flight check certification which implies a thorough and comprehensive evaluation. It is our understanding that the flight check consisted of merely 5 hours of testing a privately owned training facility, as distinguished from a commercial airport servicing scheduled air carriers. Ordinarily, 21 hours is the minimum required;

5. The last paragraph is significant. It states the "facilities as found" were within Category I except for "localizer modulation which was high." The "facilities as found" consisted of (1) localizer, (2) glide slope, (3) outer marker, and (4) middle marker. The inspector found that the localizer modulator was not within tolerance; he further found that the middle marker was

inoperative. Thus, two of the four components, i.e., 50% of the equipment tested, was found unsatisfactory. Further, the localizer and glide slope monitor was not checked. Monitor checking is *required* as part of standard flight inspection under U.S.S.F.I.M., paragraph 217.3216 and 217.3213.

An article recently appeared in Aviation Week commenting on the recent air crashes and loss of lives. (A copy of the article is attached). The author of the article critizes the FAA for its policies in purchasing piecemeal equipment having primary concern for pennies rather than accuracy and human lives.

It is utterly astonishing in the wake of so many crashes and fatalities that the Department should indicate a willingness to accept a bid which is "cheap" in price and quality. Most significantly, however, the bid does not respond to the Schedule of Work. The Schedule created the impression that the demands of the FAA were conscious of the current exigencies. The suggestion of awarding the contract to AIL belies the impression.

We submit, the acceptance of the AIL unresponsive bid, would be a total abdication of FAA's responsibility to provide those safety standards expected by air passengers.

Sincerely,

Scanwell Laboratories, Inc.

/s/ Leslie E. Shoemaker

Leslie E. Shoemaker
President

LES/jmd
Enclosure

cc:
Mr. John A. Volpe, Secretary, Department of Transportation; Mr. Charles H. Ruby, President, Air Line Pilots Association; Hon. Mike Gravel; Hon. Theodore F. Stevens; Hon. George

Murphy; Hon. Alan Cranston; Hon. Barry Goldwater; Hon. Stuart Symington; Hon. Thomas J. Eagleton; Hon. Norris Cotton; Hon. Thomas J. McIntyre; Hon. Richard S. Schweiker; Hon. Hugh Scott; Hon. Harry F. Byrd, Jr.; Hon. William B. Spong; Hon. Joel T. Broyhill; Hon. Jennings Randolph; Hon. Robert C. Byrd; Hon. Harley O. Staggers; Hon. Walter F. Mondale; Hon. Peter H. Dominick; Hon. John J. Rooney.

LETTERHEAD OF CUTLER-HAMMER

February 10, 1969

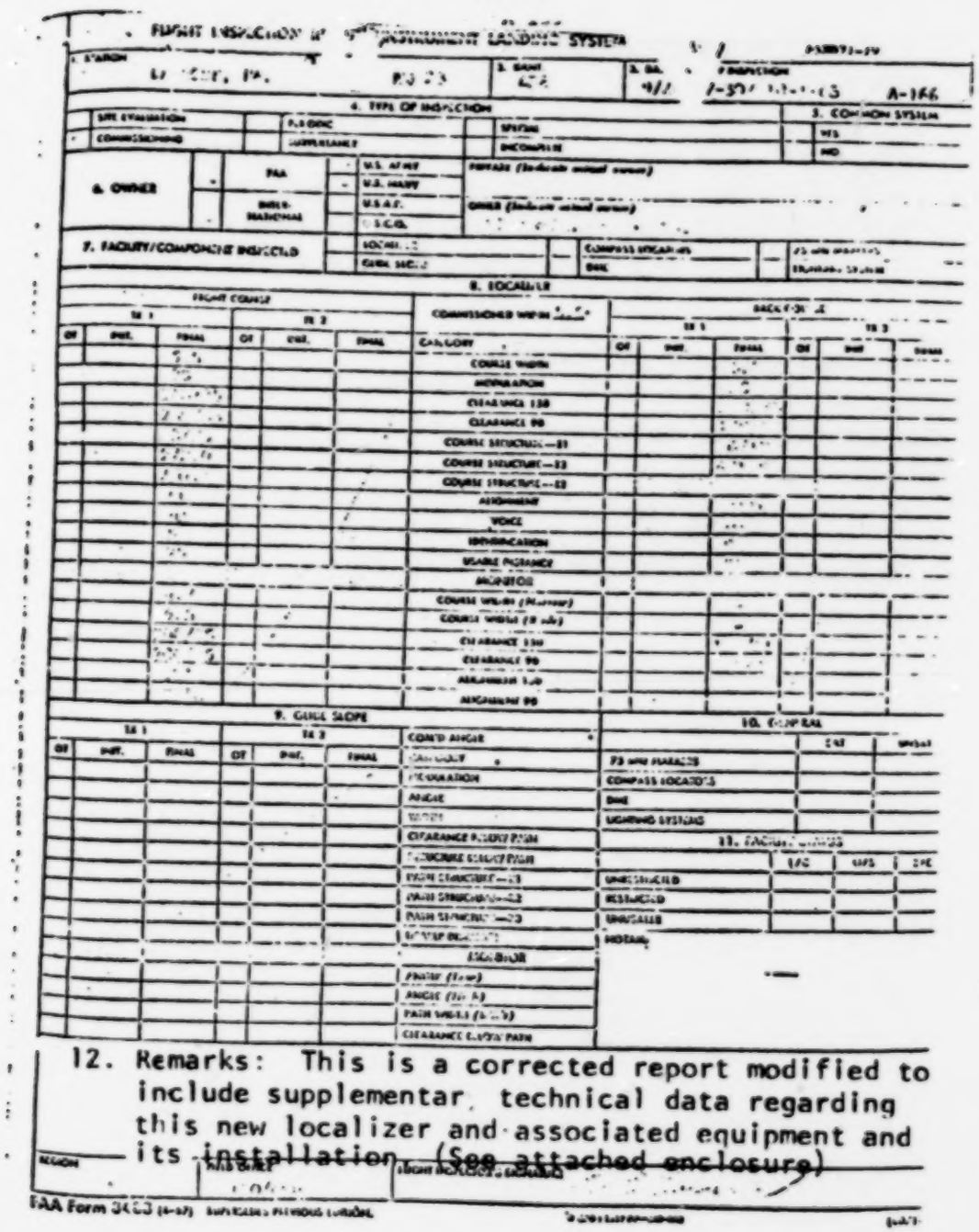
Ref: WA5M-9-0366B1

Enclosed are three (3) executed copies of Flight Inspection Reports, FAA Form 3488, demonstrating Category I performance for Airborne Instruments Laboratory ILS equipments as follows:

1) ILS at Blythe, Cal.

2) Localizer and Markers at Latrobe, Pa.

[Signed]



12. Remarks: This is a corrected report modified to include supplementar, technical data regarding this new localizer and associated equipment and its installation. (See attached enclosure)

BEST COPY AVAILABLE

Encl No. 1

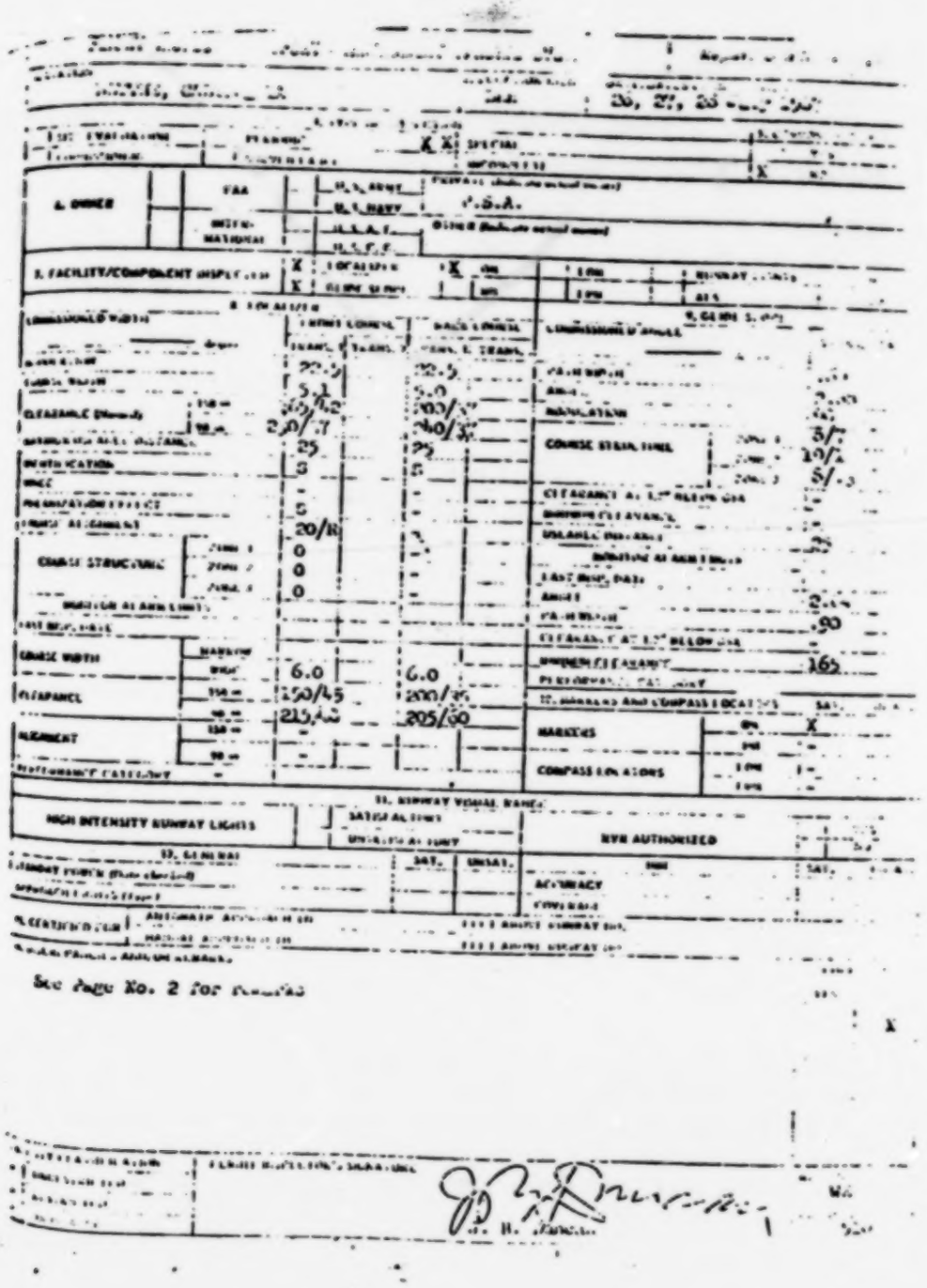
Commissioning flight check of Latrobe, Pa., localizer, outer marker and middle marker.

Equipment installation was performed by Mr. Charles Denzon of Air Traffic Control Systems Incorporated and ground inspection for FAA Certification performed by Mr. George Barrett from the Cleveland Area Office.

Type of equipment follows:

Marker Transmittor	AIL 55-440	1 Watt output power
Marker Antenna	AIL 55-410	
Radio Beacon	Southern Avienica II-25	25 Watts output
Localizer Transmitter	AIL 55-120	20 Watts output
Localizer Antenna	AIL 55-110	9 "Twin-Tco" elements
Monitor Equipment	AIL 55-120	

AIL (Airborne Instrumentation Laboratories)



See Page No. 2 for Remarks

BEST COPY AVAILABLE

Flight Inspection Report Instrument Landing System, Blythe, California dated 26, 27, 28 July 1967-Loc and G/S J. B. Duncan

Item 14. Discrepancies and/or remarks:

This was a special evaluation flight check of the Instrument Landing System manufactured by Airborne Instruments Laboratory and installed on runway 26, Blythe, California.

Initial check of the localizer indicated approximately 24% modulation. This was reduced to 21.5% but slowly increased to 22.5% by the third day of the flight check. It was noted that for a 5° course sensitivity there was 2.1° on the 90 *HA* side and 2.9° on the 150 Hi side. This was reflected on the clearance orbit as the 90 *HA* side showed 200 ua clearance while the 150 *HA* side had a minimum of 140 ua clearance at 17 NM.

The Glide Slope angle was initially found at 3.08° with a course of 68°. The antennas were then raised and the angle went to 2.75° course width .67°. Following rephasing, the angle was 2.68°. The final adjustments left the angle at 2.68° course width .69°.

It was noted when the path was widened to .9° the angle went to 2.64°. The below path clearance when in this condition was satisfactory. No monitor check was made.

Glide slope modulation varied from 85% to 90% throughout the flight check.

The middle marker was inoperative. Outer marker was initially out of tolerance wide. This was corrected by inserting a 6 DB pad in the line between the transmitter and antenna.

Flight check of the AIL ILS System indicated good flyability throughout, however, analysis of the recordings showed the G/S to have a 19 ua bend in Zone 2, approximately one mile from the end of the runway. This would preclude classification as Category II.

[Sgd] J. B. Duncan
J. B. Duncan

WALL STREET JOURNAL, PACKARD ARTICLE, JUNE 26, 1972, P. 8

Notable & Quotable

David Packard, former Deputy Secretary of Defense, speaking before the National Security Industrial Association, a defense advisory group made up of contractors, scientists and others, upon receiving the group's James Forrestal Memorial Award in Washington, D.C.:

Within the Defense Department . . . there continues to be a degree of competition between the services—and frequently between parts of a service—that is unacceptable because it is inconsistent with the common commitment. Some competition is healthy, but not when it begins to affect such major matters as funding, missions and roles. Jealousies and in-fighting will only serve to drain our nation's energies.

In the same vein, I am not much impressed by what I have seen in the attitudes of some of our great corporations in the so-called military-industrial complex. You are, of course, aware of the problems we have had with the C-5A, the Mark 48 and other programs which have had much publicity. In many ways, the problems are deeper than they appear to be.

I visited one plant last year that was running a year behind its project schedule. After a couple of hours it was apparent the company knew it would be at least a year off schedule on the day the contract was signed. I asked the manager why he offered to do the job in one year less than was possible. The essence of his reply was—yes, we knew we could not meet the terms of the contract, but there was no way to get the contract if we told the truth.

One serious impediment to good defense management is that defense contractors can appeal directly to the Congress. On one occasion, about two years ago, a company tried to reverse a decision I had made by appealing to one of our congressional committees. The company's recommendation was purely one of

self-interest and it was wrong. The company knew it, and I knew it, and so I called the management of the company and told them so.

What is the solution? We are going to have to stop this problem of people playing games with each other. Games that will destroy us, if we do not bring them to a halt.

Let's take the case of the F-14. The only sensible course is to hold the contractor to his contract. Although some companies may be forced to suffer financially because of this concept, it will not be a major disaster to the country. It will be a very major disaster to the country if we cannot get the military-industrial complex to play the game straight. Until and unless we can stop this attitude, we are going to continue to waste the taxpayer's dollars—get less defense for the dollars we spend.